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That creditors of a corporation before extending their credit must, at their peril, take notice of its powers and limitations is emphasized by two recent decisions, viz: Kampman v. Tarver (Texas), 29 S. W. Rep. 768, and Tarver v. Stevenson, decided by the United States Court of Appeals for the Eighth Circuit and not yet reported. Both of these cases arose out of the failure of a Texas corporation, the capital stock of which had been increased from one hundred thousand dollars to one million two hundred thousand dollars, at ten dollars per share, one dollar per share of which had been paid up, and the stockholders being sued by the receiver on their liability for the balance. There were in effect three questions involved: First, whether under the laws of Texas it was within the power of a corporation, organized under the statutes of that State, to increase its stock to more than double its original capital. Second, whether, as against creditors, stockholders who had voted and acted upon such increased stock were estopped to deny their liability. Third, whether such stock was void as to the whole issue or whether stockholders should be held liable for their proportion of such issue of stock as the corporation was authorized to make. The statute of Texas applicable to corporations provides that the capital stock of a corporation can be increased only to the extent of double the amount of its original capital. Another section of the same chapter provides that corporations may amend their charters with the reservation that any amendment violative of the laws of the State or of any of the provisions of that chapter are "of no force or effect."

It appeared in these cases that the Laredo Improvement Company had sought to amend its charter and an ingenious argument was made by the receiver, based upon the construction and phraseology of the statutes, that while a corporation is restricted to an increase of its stock to double its original capital yet its power of amendment is practically unlimited; in other words, that if the corporation had proceeded to increase its stock under the statute directly applicable thereto it could only have doubled its capital, but that having acted under the section applicable to amendments it could increase its stock by such amendment to any amount. This specious contention was overruled by both courts which held that there was no power under the laws of Texas in any corporation by amendment or otherwise to increase its stock to a figure more than double its original capital. Upon the subject of estoppel the case of Scoville v. Thayer, 105 U. S. 143, was in point, wherein it was held that there could be no estoppel as against *ultra vires* or absolutely void stock even as against creditors of a corporation. The distinction was noted between void stock or stock which there is no power to issue and stock which has been defectively or irregularly issued, the power to issue same being conceded. As to the latter, of course, estoppel may be pleaded. In the case of void stock, creditors have no reasonable cause to complain of a successful denial of liability. They must know that the law permitted no such increase of the capital stock and they were, therefore, not misled in giving credit to the company on the strength of such invalid increase.

The third question whether the stock was void as to the whole issue, which arose only in the Texas case, seemed to that court a more difficult question. "Can we say," said the court, "that the shares to the extent to which the corporation was empowered to increase its capital are valid, and that he should be held liable to the amount of the subscription for such share, that is to say, for one-eleventh of his subscription? It seems to us that such a ruling would make a contract for the parties which they have not made for themselves. The appellant in a case before the court subscribed and agreed to pay for 700 shares of the new stock, and not for 63 7-11 shares. Suppose a subscriber had agreed to take one share, could he have been forced to accept and pay for one-eleventh of a share? If the corporation had lawfully provided for an increased issue of shares to the amount of $100,000, and had at the same time directed an additional issue to the amount of $1,000,000, and if appellant had subscribed for both, it may be

that he would be bound to pay for the valid shares. But in this case the good and the bad are blended, and we know of no rule by which they are to be separated." In Merrill v. Gamble, 46 Iowa, 615, the defendant, having been sued on a note, pleaded that it was given for stock in a railroad corporation, to be issued to him upon the payment of the debt; that at the time the note was executed the authorized capital of the company was $500,000, which might be increased to $1,000,000 by a vote of the stockholders; that subsequently the stock was illegally increased to the amount of $2,195,000, and the stock issued; and that the legal shares could not be distinguished from the illegal. The court held that, because the shares were not distinguishable, the defense was good.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW—MISSOURI STATUTE AGAINST PEDDLING WITHOUT LICENSE.—In Emert v. State of Missouri, recently decided by the Supreme Court of the United States, it was held that a Missouri statute (Rev. Stat. 1889, ch. 125), imposing a penalty for peddling without a license is nowise repugnant to the power of congress to regulate commerce among the States, but is a valid exercise of the power of the State over persons and business within its borders as applied to a person in the employ of the Singer Manufacturing Company, a corporation of New Jersey, who went from place to place in Montgomery county, Missouri, with a horse and wagon, soliciting orders for the sale of Singer sewing machines, having with him in the wagon a new machine which he offered for sale to various persons at different places in said county, and sold and delivered to a purchaser in said county; said machine having been made by said company in New Jersey and was its property and was forwarded by it to Missouri to said person, as its agent, for sale on its account, and was so sold by him on account of said company, he having no peddler's license at the time. Mr. Justice Gray who delivered the opinion of the court says, in part, after citing the early case of Howe Machine Co. v. Gage, 100 U. S. 677:

It has been strenuously argued that that decision is inconsistent with earlier and later decisions of this court upon the subject of the powers of the several States as affected by the grant of the constitution to congress of the power to regulate commerce. It becomes necessary, therefore, to examine those decisions with care, beginning with the earlier ones.

In the leading case of Brown v. Maryland (1827), 25 U. S. 12 Wheat. 429 [6: 678], in which it was adjudged that a statute of Maryland, requiring, under a penalty, importers or other persons selling foreign goods by the bale or package, to take out and pay for a license, was repugnant to the constitution of the United States, both as laying an impost or duty on imports without the consent of congress, and as inconsistent with the power of congress to regulate commerce with foreign nations, Mr. Taney and Mr. Johnson, for the State of Maryland, argued that the tax was "laid upon the same principle with the usual taxes on retailers, or innkeepers, or hawkers and peddlers, or upon any other trade exercised within the State." 25 U. S. 12 Wheat. 425 [6: 680].

Chief Justice Marshall, in answering that argument, said: "This indictment is against the importer for selling a package of dry goods, in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with general property of the State, by breaking up his packages and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall also have purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate or other furniture used by the importer. So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them he can as little object to paying for this service, as for any other, for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way." Brown v. Maryland, 25 U. S. 12 Wheat. 443 [6: 687].

A like distinction was recognized in the United States Internal Revenue Act of 1862, in which "peddlers" were distinguished from "commercial brokers," and were subjected to a different license tax. Among "commercial brokers" was classed "any person or firm, except one holding a license as wholesale dealer or banker, whose business it is, as the agent of others, to purchase or sell goods, or seek orders therefor, in original or unbroken packages or produce." "Peddlers" were thus defined: "Any person, except persons peddling newspapers, bibles or religious tracts, who sells or offers to sell, at retail, goods, wares or other commodities, traveling, from place to place, in the street, or through different parts of the country, shall be regarded as a peddler, under this Act." Act of July 1, 1862, chap. 119, § 64, cls. 14, 27; 12 Stat. at L. 457, 458.

In Woodruff v. Parham (1868), 75 U. S. 8 Wall. 123 [19: 382], it was adjudged by this court, speaking by

Mr. Justice Miller, that a uniform tax imposed by ordinance of the city of Mobile, under authority from the legislature of Alabama, on all sales by auction in the city, was constitutional, because it was "a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States, or the rights of their citizens; and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void." 75 U. S. 8 Wall. 140 [19: 387].

In Hinson v. Lott, 75 U. S. 8 Wall. 148 [19: 389], decided at the same time, it was adjudged by this court, speaking by the same eminent justice, that a statute of that State, imposing a tax of fifty cents per gallon, to be paid by the distiller, on all intoxicating liquors manufactured within the State, and a like tax, to be paid by the importer, on all intoxicating liquors introduced into the State for sale, was constitutional, on the ground "that no greater tax is laid on liquors brought into the State than on those manufactured within it," and "that, whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision, necessary to make the tax equal on all liquors sold in the State. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States." 75 U. S. 8 Wall. 153 [19: 389].

In Ward v. Maryland (1871), 79 U. S. 12 Wall. 418 [20: 449], a statute of Maryland, requiring all traders residing within the State to take out licenses at certain rates, and subjecting to indictment and penalty persons not residents of the State, who, without taking out a license at a higher rate, should sell or offer for sale, by card, sample, or trade list, within the limits of the city of Baltimore, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in the State, was held to be unconstitutional, because it imposed a discriminating tax upon the residents of other States.

In Welton v. Missouri (1875), 91 U. S. 275 [23: 347], a statute of Missouri, by which "whoever shall deal in the selling of patent or other medicines, goods, wares, or merchandise, except books, charts, maps and stationery, which are not the growth, produce or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler," and which prohibited, under a penalty, dealing as a peddler, without taking out a license and paying a certain sum therefor, but required no license for selling, by going from place to place, any goods, the growth, produce or manufacture of the State, was held, by reason of such discrimination, to be unconstitutional and void as applied to a peddler within the State of sewing machines manufactured without the State. Mr. Justice Field, in delivering judgment, said: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character, That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void." And he referred to the passages in the opinions in Brown v. Maryland, and Woodruff v. Parham, above cited, as supporting the conclusion. 91 U. S. 282 [23: 350]. The statute of Missouri, now before the court, omits the discriminating words, "which are not the growth, produce or manufacture of this State," upon which that decision was grounded.

In Cook v. Pennsylvania (1878), 97 U. S. 566 [24: 1015], in which a tax upon auctioneers, measured by the amount of their sales, was held to be invalid as to sales by auction of imported goods in the original package, the statute under which the tax was imposed made a discrimination against imported as compared with domestic goods; and the decisions in Woodruff v. Parham, Hinson v. Lott, and Welton v. Missouri, above cited, were referred to as controlling. 97 U. S. 569, 573 [24: 1016, 1017].

The decision in Howe v. Mach. Co. v. Gage, 100 U. S. 676 [25: 754], above stated, is thus shown to have been in exact accordance with the law as declared in previous decisions. Indeed, Woodruff v. Parham, Hinson v. Lott, Ward v. Maryland, and Welton v. Missouri, were cited in its support. 100 U. S. 679 [25: 755].

That decision is no less consistent with the subsequent decisions of this court, as will appear by an examination of them.

In Webber v. Virginia (1880), 103 U. S. 344, 347 [26: 565, 566], this court, speaking by Mr. Justice Field, affirmed the doctrine that "the right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the State;" and the reason why a tax imposed by a statute of Virginia upon persons selling, without license, patented articles not owned by them, was held to be invalid, as applied to sales of sewing machines manufactured in another State, was that the statute made "a clear discrimination in favor of home manufacturers and against the manufacturers of other States." 103 U. S. 350 [26: 567].

In Brown v. Houston (1885), 114 U. S. 622 [29: 257], coal brought in flatboats from Pittsburg to New Orleans was still afloat in the Mississippi river after its arrival, in the same boats, and in the same condition in which it had been brought, and was held in order to be sold on account of the original owners by the boat-load. Yet this court unamiously decided that a tax imposed by general statutes of the State of Louisiana upon this coal was valid; and, speaking by Mr. Justice Bradley, said: "It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans." "The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as im-

ports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which congress has seen fit should remain undisturbed. But if, after their arrival within the State—that being their place of destination for use or trade—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce, which would have the objectionable effect referred to." 114 U. S. 632-634 [29: 260, 261].

In Walling v. Michigan (1886), 116 U. S. 446 [29: 691], the statute of Michigan, which was held to be an unconstitutional restraint of interstate commerce, imposed different taxes upon the business of selling or soliciting the sale of intoxicating liquors, according as the liquors were manufactured within the State, or were to be sent from another State; and this court, again speaking by Mr. Justice Bradley, declared that the police power of the State "would be a perfect justification of the act, if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature." 116 U. S. 460 [29: 695].

In Robbins v. Shelby County Taxing Dist. (1887), 120 U. S. 489 [30: 694], indeed, the majority of the court held that a statute of Tennessee, requiring "all drummers, and all persons not having a regular license house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein by sample," to pay a certain sum weekly or monthly for a license, was, as applied to persons soliciting orders for goods on behalf of houses doing business in other States, unconstitutional as inconsistent with the power of congress to regulate commerce among the several States.

But in the opinion of the majority of the court, delivered by Mr. Justice Bradley, it was expressly affirmed that a State, although commerce might thereby be incidentally affected, might pass "inspection laws to secure the due quality and measure of products and commodities," and "laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community;" and might impose "taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States;" and also "taxes upon all property within the State, mingled with and forming part of the great mass of property therein;" although it could not "impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made by any such regulation, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce." 120 U. S. 493, 494 (30: 696].

The distinction on which that judgment proceeded is clearly brought out in the following passages of the opinion: "As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of Brown v. Houston, 114 U. S. 622 [29: 257]. When goods are sent from one State to another for sale, or in consequence of a sale, they become part of its general property, and amendable to its laws; provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. Brown v. Houston, *qua supra;* Howe Mach. Co. v. Gage, 100 U. S. 676 [25: 754]. But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seem to us clearly a tax on interstate commerce itself." "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." Robbins v. Shelby County Taxing Dist. 120, U. S. 497 [30: 697].

The decision in Howe Mach. Co. v. Gage, *supra*, as to a peddler, carrying with him for sale goods already in the State, was thus expressly recognized, and was distinguished from the case, then before the court, of a drummer, selling, or soliciting orders for, goods which were at the time in another State. And in the dissenting opinion, delivered by Chief Justice Waite, in which two other justices concurred, it was assumed, as incontrovertible, that another provision of the same statute, requiring a license fee from all peddlers within the district, could not be held unconstitutional in its application to peddlers who came with their goods from another State, and expected to go back again. 120 U. S. 501 [30: 698].

In Asher v. Texas (1888), 128 U. S. 129 [32: 368], 2 Inters. Com. Rep. 241; and in Brennan v. Titusville (1894), 153 U. S. 289 [38: 719], the decision in Robbins v. Shelby County Tax. Dist. was followed. Asher's Case was strictly one of a drummer soliciting orders on behalf of manufacturers residing in another State, and was decided upon the grounds that the circumstances in that case and in Robbins' Case were substantially the same. 128 U. S. 131 [32: 369], 2 Inters. Com. Rep. 241. In Brennan's Case, it was expressly agreed by the parties that the goods offered by him for sale in Pennsylvania were afterwards sent by their owner in the other State directly to the purchasers. 153 U. S. 290 [38: 720]. The case of Stoutenburgh v. Hennick (1889), 129 U. S. 141 [32: 637], in which an act of the legislature of the District of Columbia, taxing commercial agents, "offering for sale of goods, wares or merchandise, by sample, catalogue or otherwise," was held to be unconstitutional, as applied to a commercial agent offering for sale goods of a Maryland house, did not substantially differ in principle or in circumstances.

In Leloup v. Mobile (1888), 127 U. S. 640 [32: 311], 2 Inters. Com. Rep. 134, in which a general license tax, imposed by a statute of Alabama on a telegraph company affecting its entire business, interstate as well as domestic or internal, without discrimination, was held unconstitutional, Mr. Justice Bradley, in delivering judgment, took occasion to observe that "there are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operations of the company;" and to repeat that "this exemption of interstate and foreign commerce from State regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State, as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce. 127 U. S. 647, 649 [32: 314], 2 Inters. Com. Rep. 134. See, also, Pullman Palace Car Co. v. Pennsylvania (1891), 141 U. S. 18 [35: 613], 3 Inters. Com. Rep. 595; Ficklen v. Shelby County Taxing District (1892), 145 U. S. 1 [36: 601], 4 Inters.

Com. Rep. 79; Postal Teleg. Cable Co. v. Charleston (1894), 153 U. S. 692 [38: 871]; Postal Teleg. Co. v. Adams (1895), *ante*.

In Dent v. West Virginia (1889), 129 U. S. 114 [32: 623], this court upheld the validity of a statute of West Virginia, requiring every person practicing medicine in the State to obtain a certificate from the State board of health; and speaking by Mr Justice Field said: "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud." 129 U. S. 122 [32: 626].

In Leisy v. Hardin (1890), 135 U. S. 100 [34: [128], 3 Inters. Com. Rep. 36, a statute of a State, prohibiting the sale of intoxicating liquors without a license, was as applied to a sale of liquors in the original packages and by the person who had brought them into the State from another State, held to be inconsistent with the power of Congress to regulate commerce among the several States; and that conclusion was reached by applying to the case the rule laid down by Chief Justice Marshall in Brown v. Maryland, 25 U. S. 12 Wheat. 443 [6: 687], above cited, and stated by the present chief justice in these words: "That the point of time, when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer." 135 U. S. 110 [34: 132], 3 Inters. Com. Rep. 36. The decision, made at the same time, in Lyng v. Michigan, was to the same effect. 135 U. S. 161 [34: 150], 3 Inters. Com. Rep. 143. Presently after those decisions, congress, by the act of August 8, 1890, chap. 728, enacted that all intoxicating liquors or liquids brought into or remaining in a State should, upon their arrival therein, be subject, like domestic liquors, to the operation of laws enacted by the State in the exercise of its police powers. 26 Stat. at L. 313. After congress had thus, as said by the chief justice, "declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature," this court unanimously held that intoxicating liquors, brought into a State before this act of congress, were subject to the operation of the earlier statutes of the State, remaining unrepealed. In Wilkerson v. Rahrer (1891), 140 U. S. 545, 560, 564 [35: 572, 576, 577].

In Plumley v. Massachusetts, decided at the present term, the question, as stated by the court, was, "Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?" After reviewing many of the cases, citing the passages above quoted from the opinions in Walling v. Michigan and in Dent v. West Virginia, and distinguished, Leisy v. Hardin, the court answered the question in the negative; and therefore held that the statute of Massachusetts, prohibiting the sale of oleomargarine colored to imitate butter, was constitutional and valid, as applied to a sale by an agent within the State of articles manufactured in another State by citizens thereof. 155 U. S. 461, 468, 471, 474 *ante*.

The necessary conclusion, upon authority, as well as upon principle, is that the statute of Missouri, now in question, is nowise repugnant to the power of congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders.

CONFLICT OF LAWS—AGREEMENT TO MAKE WILLS.—In Emery v. Burbank, 39 N. E. Rep. 1026, decided by the Supreme Judicial Court of Massachusetts, it was held under a statute of that State requiring agreements to make the wills to be in writing, that an oral agreement made in Maine by defendant's testatrix, to the effect that if plaintiff would leave Maine and take care of her she would leave the plaintiff all her property at her death, could not be enforced in Massachusetts, where testatrix died, although plaintiff had furnished the stipulated consideration. The following is from the opinion of the court:

When the law involved is a statute, it is a question of construction whether the law is addressed to the necessary constituent elements or legality of the contract on the one hand, or to the evidence by which it shall be proved on the other. In the former case, the law affects contracts made within the jurisdiction wherever sued, and may affect only them (Drew v. Smith, 59 Me. 393); in the latter, it applies to all suits within the jurisdiction, wherever the contracts sued upon were made, and again may have no other effect. It is possible, however, that a statute should affect both validity and remedy by express words, and, this being so, it is possible that words which in terms speak only of one should carry with them an implication also as to the other. For instance, in a well known English case, Maule, J., said: "The fourth section of the statute of frauds entirely applies to procedure;" and on this ground it was held that an action could not be maintained upon an oral contract made in France. But he went on: "It may be that the words used, operating on contracts made in England, render them void." Leroux v. Brown, 12 C. B. 801, 805, 827. We cite the language, not for its particular application, but as a recognition of the possibility which we assert.

The words of the statute before us seem in the first place, and most plainly, to deal with the validity and form of the contract. "No agreement . . . shall be binding, unless such agreement is in writing." If taken literally, they are not satisfied by a written memorandum of the contract; the contract itself must be made in writing. They are limited, too, to agreements made after the passage of the act—a limitation which perhaps would be more likely to be inserted in a law concerning the form of a contract than in one which only changed a rule of evidence. But we are of opinion that the statute ought not to be limited to its operation on the form of contracts made in this State. The generality of the words alone, "no agreement," is not conclusive. But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. The

nature of the contract is that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here upon such contract without written evidence, wherever it is made.

If we are right in our understanding of the policy established by the legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles. "If oral evidence were offered which the *lex fori* excluded, such exclusion, being founded on the desire of preventing perjury, might claim to override any contrary rule of the *lex loci contractus*, not only on the ground of its being a question of procedure, but also because of that reservation in favor of any stringent domestic policy, which controls all maxims of private international law." Westl. Priv. Int. Law [3d Ed.], Sec. 208; Whart. Confl. Laws [2d Ed.], sec. 766.

In our view, the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case. It is not necessary to decide exactly how broad the rule may be—whether, for instance, if by some unusual chance, a suit should happen to be brought here against an ancillary administrator upon a contract made in another State by one of its inhabitants, the contract would have to be in writing. The rule extends, at least, to contracts by Massachusetts testators. It might be possible to treat the words "signed by the party whose executor or administrator is sought to be charged" as meaning "signed by the party whose executor or administrator is sought to be charged in Massachusetts," and to construe the whole statute as directed only to procedure. Compare Fant v. Miller, 17 Grat. 47, 72 *et seq.*; Denny v. Williams, 5 Allen, 1, 3, 9. Upon this question also we express no opinion. All that we decide is that the statute does not apply to a case like the present.

The law of the testator's domicile is the law of the will. A contract to make a will means an effectual will, and therefore a will good by the law of the domicile. In a sense the place of performance, as well as the forum for a suit in case of breach, is the domicile. We do not draw the conclusion that, therefore, the validity of all such contracts, wherever sued on, must depend on the law of the domicile. That would leave many such contracts in a state of indeterminate validity until the testator's death, as he may change his domicile so long as he can travel. But the consideration shows that the final domicile is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a State to declare, upon the same considerations which dictate a rule of evidence, that a contract must have certain form, if it is to be enforced against its inhabitants in its courts. Legislation of this kind, for contracts which thus necessarily reach into the jurisdiction in their operation, hardly goes as far as statutes dealing with substantive liability, which have been upheld. Com. v. Macloon, 101 Mass. 1.

If the statute applies, the fact that the plaintiff has furnished the stipulated consideration will not prevent its application.

THE LEGAL STATUS OF A NAME.

The word or words by which the particular individual is designated and distinguished is in the legal acceptation, a name.[1] As to persons the name is the discriminative appellation. As early as the reign of William the Norman the common law established that a full name consisted of one Christian or given name and one surname or patronymic, and that the two constituted the legal name of a person.[2] Among some curious ideas existing in early days as to the importance and necessity of a given name was one which declared that it was repugnant to the rules of the Christian religion that there should be a Christian without a name of baptism.[3] Lord Coke further emphasized the value of a Christian name by asserting that a man may have divers names at divers times but not divers Christian names and that regularly it is requisite that the person be named by the name of baptism, for a man cannot have two names of baptism as he may have divers surnames.[4] But if a man be baptized by the name of Thomas and confirmed by the name of Francis, the confirmation name takes precedence of the baptismal name and in actions the man must be named Francis.[5] There is a legal presumption that every person has two names, the Christian and the patronymic, but during slavery days this presumption was held not to exist as to negroes, and an indictment against "one William—a man of color," was allowed to stand without evidence of another name.[6] Any name may be used as the Christian name, including the surname.[7] Where a person has several Christian names and chooses one other than the first name as the name by which he shall be designated, he may be indicted under the name chosen.[8] In England the full name is given legal effect, and it is usually necessary to set out the middle as well as the first name, but under the common law but one Christian name is recognized and in America middle names or letters are of no importance and are with-

[1] 2 Bouv. Law Dict.; People v. Ferguson, 8 Cow. (N. Y.) 102.
[2] Schofield v. Jennings, 68 Ind. 233.
[3] 4 Bacon's Abr. 752.
[4] Coke, Litt. 3*a*.
[5] 15 Viner's Abr., p. 595.
[6] Boyd v. State, 7 Coldw. (Tenn.) 69.
[7] State v. Bayoune, 23 La. Ann. 78.
[8] U. S. v. Winter, 13 Blatch. 276.

out legal significance, being properly regarded as surplusage. No recognition is given of a middle name and pleas or indictments omitting the middle name or letter are without objection and proper, but, on the other hand, an indictment under a middle name without the first name will not stand.[9] Massachusetts alone of all the States regards the middle name with favor and indictments or pleas omitting it are bad.[10] In West Virginia, the all but universal rule declaring that the middle name or initial is no part of the name has recently been reaffirmed in an important case,[11] and the omission of the first initial of a name is a fatal variance in an indictment in Texas.[12] A mistake in the given name may, however, sometimes be corrected by parol testimony and such evidence was admitted to show the mistake when a stock certificate contained the wrong Christian name of the stockholder.[13] Likewise in foreclosure proceedings under a power of sale in a mortgage, a mistake in the middle initial of the mortgagor's name will not invalidate the sale.[14] Where land of a decedent was set off to a widow, the fact that in the record of proceedings to obtain the decree she was called by two Christian names does not invalidate the proceedings on the ground that the record failed to show that she was the widow of decedent, where the record otherwise showed she was.[15] In this connection it is also necessary to observe that the words "junior" and "senior" or their abbreviations have no legal import whatever. They are simply words of description, and may be added or not without effect.[16] A deed from Elijah Core of Halifax to Elijah Core, Jr., of Halifax, was presumed to be from father to son.[17] Where there are two persons, father and son, in the same locality of the same name and an action is brought without adding a word of description as "junior" or "younger," the law will presume that the father is intended.[18] If one name be corrupted of another and both have a common derivation, the one may be used for the other.[19]

Where a single vowel precedes a surname the vowel will be considered to be the Christian name. A vowel which is in itself a word and may be pronounced separately may be a name though a consonant which is incapable of being pronounced without the addition of a vowel cannot,[20] but later decisions and the weight of authority has now established that a consonant as well as a vowel may be considered as a Christian name. "We see no sensible or rational ground for any distinction between a vowel and a consonant and think that either of them may be a name; and that name is denoted by the sound by which it is called or pronounced when spoken or uttered audibly as a letter."[21] In a recently reported English case a person was stated to have been christened "J" and it was there decided that "J" was the person's given name.[22] Chief Justice Marshall in Breedlove v. Nicolet,[23] where the plaintiff's name was J. J. Sigg, held: "He may have assumed the letters 'J. J.' as distinguishing him from other persons of the surname of 'Sigg.' Objections to the name of plaintiff cannot be taken advantage of after judgment." At marriage a woman's surname is changed to that of her husband. By the statute law of many States, a woman is permitted to resume her maiden name after a divorce *a vinculo* by order of the court although the divorce itself is not alone sufficient to authorize the presumption or adoption of another name.[24] The power to change the name of an individual is vested in the court of record. The person applying to the court for such permission must observe certain requirements sufficient to satisfy the judgment of the court, and the exercise is usually a matter of discretion.[25] The New York rule requires a statement showing whether the applicant is

[9] Milk v. Christie, 1 Hill (N. Y.), 102; Van Vooris v. Budd, 39 Barb. 91; Miller v. People, 39 Ill. 457; Franklin v. Tallmadge, 5 Johns. (N. Y.) 84; Gaines v. Stiles, 14 Pet. (U. S.) 322; Diggs v. State, 49 Ala. 311.

[10] Terry v. Sisson, 125 Mass. 560; Com. v. Hall, 3 Pick. (Mass.) 262.

[11] Long v. Campbell, 37 W. Va. 655.

[12] English v. State, 18 S. W. Rep. 94.

[13] Clerlland v. Burnham, 64 Wis. 347.

[14] Johnson v. Day, 50 N. W. Rep. 701.

[15] Threkeld v. Allen, 32 N. E. Rep. 576.

[16] People v. Cook, 14 Barb. 259; Com. v. Perkins, 1 Pick. Mass. 388.

[17] Cross v. Martin, 46 Vt. 14.

[18] Fleet v. Youngs, 11 Wend. (N. Y.) 522; Kincaid v. Howe, 10 Mass. 203.

[19] Gordon v. Holiday, 1 Wash. 285.

[20] 16 Dowl. & L. 396.

[21] Tweedy v. Jarvis, 27 Ct. 45.

[22] 6 M. G. & S.

[23] 7 Pet. (U. S.) 413.

[24] N. Y., Mass., Vt., R. I., Conn., Ohio, Ill., Ky., Wash.; Stim. Am. Stat. Law, § 6242.

[25] A local law changing a person's name is forbidden in Ark., Cal., Fla., Ill., Ind., Ia., Ky., La., Md., Minn.,

married or single; whether any judgments exist or actions are pending against him; whether there is any outstanding commercial paper in the name sought to be abandoned; and the applicant's place of birth, age and names of parents.[26] No person is bound to accept his patronymic as a surname nor his Christian name as a given name, though the custom to do so is almost universal among English speaking people who have inherited the common law.[27] There is no property right in any particular name as a surname and one person cannot prevent another assuming the same name.

Idem Sonans.—Owing to the fact that there are no rules regulating the spelling and pronunciation of names of persons, the courts from the necessity of very embarrassing complications which have arisen, have formulated a principle or rule known as *idem sonans*. The rule is that if a name spelled in a document, pleading, process or proceeding is not the correct spelling thereof but when pronounced according to commonly accepted methods, produces a sound identical with the correct name as properly pronounced, the word so used although incorrectly spelled becomes a sufficient designation of the individual to whom reference is made or the proceeding directed.[28] The law does not take notice of orthography and therefore if a name be misspelled no name can come, provided that the name as written in the indictment is *idem sonans*, with the true name. It is sometimes a nice matter to determine where names are of the same sound and courts do not in this matter hold the rule of identity with a strict hand.[29] As good an explanation of the rule as exists is contained in a Missouri case. "It matters not how two names are spelled, what their orthography is, they are *idem sonans* within the meaning of the books, if the attentive ear finds difficulty in distinguishing them when pronounced or common and long continued usage has by corruption or abbreviation made them identical in pronunciation."[30] How to determine whether a name falls within rule of *idem sonans* has been a question of considerable discussion and conflicting opinion. The English method which has been followed and cited with approval in many American States, is that if two names spelled differently necessarily sound alike the court may, as a matter of law, pronounce them to be *idem sonans;* but if they do not necessarily sound alike, the question whether they are *idem sonans* is a question of fact for the jury.[31] The courts of Virginia are more emphatic that the determination of the question is a matter for the jury and not the court to decide. "The court cannot instruct the jury as a matter of law, that any two names are or are not of the same sound."[32] In Alabama, however, there is much doubt concerning the propriety of submitting the determination to the jury. "Generally such issue is triable by the court." We will not say that there might not be cases in which it would be permissible to introduce evidence on the question as where foreign name is at issue. But the decided weight of authority is that if the words do not necessarily sound alike whether they are *idem sonans* or not, is a question of fact for the jury.[33] Judicial notice, however, will not be taken of the fact that two names are ordinarily pronounced so nearly alike to be indistinguishable.[34] As regarding matters of record the searcher is not bound to know how the name against which search is made is spelled according to the rules of foreign languages.[35] In criminal laws, in pleas or indictment or warrants, after failure to ascertain the true name, proceeding may be had under a fictitious name and the proper name inserted if afterward discovered or no name at all may be mentioned, but simply a description designating and identifying the individual. In Indiana it was held sufficient for the jurors to find that the deceased "was an Indian of the State of Miami nation of Indians, the name of which said Indian to the jurors aforesaid is wholly unknown."[36] So in Arkansas the defendant was indicted for assault upon "one Rice whose Christian name is to the grand jurors unknown."[37] A person

Mo., Miss., Neb., Nev., N. Y., Oreg., Penn., Tenn., Tex., Va. & Wis.; Stim. Am. Stat. Law, § 1395, *et seq.*

26 Matter of Hamilton, 10 Abb. N. C. 79.

27 Schofield v. Jennings, 68 Ind. 233; City Council v. King, 4 McCord, S. C. 487.

28 Leatherbarrow v. Ward, 5 Jur. 388.

29 Bish. Crim. Proc. § 688.

30 Robson v. Thomas, 55 Mo. 581.

31 Rex v. Davis, 4 New Sess. Cas. 411.

32 Taylor v. Com., 20 Gratt. Va. 825.

33 Com. v. Donovan, 95 Mass. 57; Weitzel v. State, 28 Tex. App. 523; Com. v. Warren, 143 Mass. 58.

34 Donnell v. U. S., 1 Morris, 141.

35 Buchanan v. Sumner, 2 Barb. Ch. 197.

36 State v. Jackson, 4 Black. 49.

37 Cameron v. State, 13 Ark. 712.

may be known by one or by two or by several names. All names except the proper one are aliases and the person assuming and making himself known under other names than his own may be sued or proceeded against civilly or criminally under any one of them, together with the averment that he is otherwise known by the other name.[38] In such cases it is sufficient if proof be given to the effect that the person so designated is known by any one of the names set out.[39] In several States the statute of Henry V, chapter 5, known as the statute of additions, is still in force. By this statute certain indictments were required to describe the defendants by adding to their names their estate, degree or mystery and place of residence.[40] In some other States the rule has been abolished or modified. In England it was held to be a fatal variance to describe a woman as a widow when she was a *feme covert*.[41] In 6 Blackf. (Ind.) 49, the court says: "The statute of additions, 1 Hen. V, ch. 5, enacts that defendants shall be described by adding to their names their estate, degree or mystery and place of residence in all cases in which the exigent shall be awarded. The exigent being a step in the proceedings of outlawry is unknown to our law. It is clear that the common law does not require the defendant to be described by his additions." A marriage under a fictitious name will not invalidate the contract unless entered into through fraud and misrepresentation.[42] Courts do know judicially that one class of names apply to males and another class to females. In Massachusetts the word "Jo" was held to mean a male by name of Joseph, but the United States courts have held that the word "Jo" indicates no sex.[43] The name of the person is frequently held to be equivalent to "blood" and "family" in cases of involving wills and descent. A qualification that the legatee or devisee be of the testator's name is used as designating one whose name answers that of the testator, as denoting one of the testator's family, the word meaning the same as "family" or "blood." The first meaning, however, prevails in the absence of an explanatory context.[44]

The Name of a Corporation.—Corporations must adopt and be known by some particular name and this must be used in all proceedings by or against the corporate body, although an immaterial variation from the correct name will not vitiate the proceedings.[45] If the corporate capacity is not alleged in an action against a corporation, the defendant may demur to the plea. The general rule has been that where the name is such as might probably be adopted by a corporation it is sufficient although not expressly averred.[46] But it can no longer be stated as a fixed rule as the unmistakable trend of authority is the other way. In New York it is now provided by statute that a special averment of corporate existence is necessary and if not alleged is a good ground for demurrer.[47] Many other States incline toward the same restriction, so that the exceptions are now of more value than the rule itself.[48] In New York it is no longer necessary to prove the existence of the corporation unless there is an affirmative denial of its existence.[49] If a corporation is incorrectly named in an indictment the remedy is by a plea in abatement. Where service is made upon the proper officers and such plea is not made, the judgment will bind the corporation, though named by another than its corporate name.[50] The name of a corporation can be changed only by the creating powers. The reason of this is that the identity of name is the principal means for effecting the perpetuity of succession, which is an important purpose of incorporation. The title to shares, the liability on contracts, and the right to assets, would be in danger of confusion if the name were subject to change at will, like the name of a partnership.[51] The power to change a corporate name is usually lodged in the courts by the legislature. A law changing the name of a corporation does not alter the contract between the shareholder or impair any of their franchises.[52] And even if the

[38] Kennedy v. People, 39 N. Y. 245; Rutherford v. State, 13 Tex. App. 92.
[39] Evans v. State, 62 Ala. 6.
[40] Stim. Am. Stat. Law.
[41] Rex v. Deeley, 1 Wood, C. C. 703.
[42] Rex v. Inhab. Burton, 3 M. & S. 537.
[43] Com. v. O'Baldwin, 103 Mass. 210.
[44] 2 Jarman on Wills, 141.
[45] State v. Brin, 30 Minn. 522.
[46] 14 Am. Dec. 526.
[47] Code Civ. Proc. § 1775.
[48] U. S. v. Ins. Co., 22 Wall. U. S. 90; Pullman v. Upton, 96 U. 328.
[49] Code C. P. § 1776.
[50] Wilson v. Baker, 52 Ia. 423.
[51] Regina v. Registrar, 10 Adoll. & Ell. 839.
[52] Del. R. Co. v. Irick, 3 Zabr. (N. J.) 321.

legislature changes the name of a corporation yet if the corporation continues to do business in its old name, it may regain such name by usage and be lawfully proceeded against in bankruptcy by that name.[53] Where a corporation exists by special charter and its name is changed and the corporate body be organized under general law it is in many respects still the same, and a judgment against it under its new name, by which it is dissolved for forfeiture of charter, will be held to cover the acts of the original incorporation.[54]

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[53] Alexander v. Bunney, 28 N. J. Eq. 90.

[54] People *ex rel.* Barton v. Reiss Ins. Co., 38 Barb. 323.

USURY—DISCOUNTING COMMERCIAL PAPER.

BANK OF NEWPORT V. COOK.

Supreme Court of Arkansas, February 23, 1895.

The taking of the highest legal rate of interest in advance on a negotiable note payable 12 months after date does not constitute usury under the Arkansas constitution and act of February 9, 1875, authorizing lenders of money to reserve or discount interest upon commercial paper not to exceed 10 per cent. per annum. Battle, J., dissenting.

HUGHES, J.: The question in this case is, does the taking in advance of the highest rate of interest allowed by the constitution upon a negotiable note, payable 12 months after its date, constitute usury? The provision of the constitution upon the subject of usury is (article 19, § 13): "All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest, and the general assembly shall prohibit the same by law, but when no rate of interest is agreed upon, the rate shall be six per centum per annum." The act of the legislature approved February 9, 1875, only a few months after the adoption of the constitution, upon the subject of discounting commercial paper, mortgages, or other securities, is as follows: "It shall be lawful for all parties loaning money in this State to reserve or discount interest upon any commercial paper, mortgages or other securities at any rate of interest agreed upon by the parties, said rate not to exceed ten per cent. per annum," etc. The only limitation in this act is upon the kind of paper, so far as it affects the case at bar, and that is that it shall be commercial paper. In Vahlberg v. Keaton, 51 Ark. 539, 11 S. W. Rep. 878, this act is held to be constitutional where the paper discounted, or upon which interest is reserved, is three-months paper, used in commercial transactions; the question in that case having arisen upon, and, necessarily, been confined to, three-months paper. The act of the legislature passed soon after the adoption of the constitution,—in fact at the first session thereafter,—though not obligatory if it violates the constitution, is entitled to serious consideration as a legislative construction of the above provision of the constitution, and, unless it is clear beyond reasonable doubt that it is in conflict with the constitution, it is the duty of the court to sustain it. It is said in Vahlburg v. Keaton, *supra*, in reference to the constitutionality of the above statute, that "it is also said to be a correct rule in constitutional interpretation to construe it, not according to its technical meaning, but according to the acceptation of those who adopted it. * * * It must be presumed that it was framed and adopted in the light and understanding of prior and existing laws, and with reference to them. * * * The statute of Anne provided, in substance, that no person should take, directly or indirectly, for loan of money, etc., interest at a higher rate than five per cent. per annum, and that all contracts whereby there was reserved or agreed to be paid interest at a higher rate should be utterly void." The question came before the Court of Common Pleas under this statute, and Sir William Blackstone conceived that "interest may as lawfully be received beforehand for forbearing as after the term is expired for having forborne." Lloyd v. Williams, 2 W. Bl. 792. And this was followed in Auriol v. Thomas, 2 Term R. 52; Marsh v. Martindale, 3 Bos. & P. 154; and Floyer v. Edwards, 1 Cowp. 112. But "no shift will enable a man to take more than legal interest upon a loan." So it is settled in our State that it is not usury, under our present constitution, to take interest in advance, and that the above act is valid "so far as it relates to transactions of a commercial kind in short-time paper." It is said in the opinion in Vahlberg v. Keaton that, "although this relaxation against the prohibition of usury was first sanctioned in the transactions of banks and other corporations authorized to make discount, a distinction could not be made against individuals, and it became universal;" citing 3 Pars. Cont. p. 131; Bank v. Butts, 9 Mass. 49; Marsh v. Martindale, *supra;* Insurance Co. v. Ely, 2 Cowen, 703; Cole v. Lockhart, 2 Cart. (Ind.) 631; Parker v. Cousins, 2 Grat. 373. In the case of Vahlberg v. Keaton, it is also said that: "The clause of the constitution is no broader in its terms, and seems to reach no further in its purpose, than the act of 1838, the act of Anne, or the acts of other States upon the subject. The framers of the constitution intended only to make the prohibition against usury, as it had formerly been understood, a part of the organic law, and not leave it to depend on the discretion of the legislature, or the chances of party ascendency. Such being the purpose of the constitution, and such the meaning given statutes embodying its terms by previous judicial construction, it follows that it will receive the same construction placed upon the similar statutes. This conclusion receives

support in the fact that the legislature meeting very soon after its adoption, dominated by the purpose that controlled in its adoption, and charged with the duty of carrying it into effect, enacted the statute referred to." We have quoted largely from the above case, because we consider it a well-considered and sound opinion, throwing much light upon the question under consideration here, supported, as we find it to be, by the numerous cases referred to in it. It will be observed that the opinion is confined to "short-time paper" and in "transactions of a commercial kind." The opinion does not undertake to define "transactions of a commercial kind in short-time paper," because it was unnecessary, for the paper was unquestionably of that kind in that case, being three-months paper,—a negotiable promissory note.

The statute above quoted uses the term "commercial paper," and the note in the case at bar was commercial paper,—a negotiable promissory note, payable in twelve months from its date, for $2,500; and the interest, $250, was taken out in advance, and only $2,250 paid to the borrower. Now, if this transaction was not usurious, by reason of the length of time the note, out of which the interest was taken in advance, had to run, it was not usurious. This is the only possible question in the case. In the following cases taking interest at the highest legal rate in advance, on six-months paper, was held not to be usurious, viz: Insurance Co. v. Bloodgood, 4 Wend. 652; Bloomer v. McInery, 30 Hun, 201. In the following cases the taking of the highest legal rate of interest in advance on one-year paper was held not to be usurious, viz: Cole v. Lockhart, 2 Cart. (Ind.) 631; Mitchell v. Lyman, 77 Ill. 525; McGill v. Ware, 4 Scam. 21. In the following cases the highest legal rate of interest was reserved in advance on paper having from 23 months to 5 years to run, and this is held not to be usurious, viz: Fleckner v. Bank, 8 Wheat. 339; English v. Smock, 34 Ind. 116 (semi-annually in advance for 5 years); Brown v. Mortgage Co., 110 Ill. 235 (semi-annually in advance for 5 years). See, also, Hoyt v. Institution, *Id.* 390; Bacchus v. Moreau, 7 Rob. (La.) 539 (semi-annually in advance for 5 years.) In McGill v. Ware, 4 Scam. 21, the court, after reviewing the cases in England and America upon this question said: "I have reviewed these decisions to show that the first impression of the courts was that it was usurious to take interest in advance, as evidenced by the first *dicta* and decisions; and also that the courts very early decided it was not usury under the statutes of Henry VIII., and have followed up that decision uniformly down to this period, under all the English and American statutes. Such a long course of uniform decisions for upwards of 200 years ought to settle the question, more particularly so with us, as those decisions were made upon statutes precisely like our own as to the mode of reserving interest, and which were known before its passage. * * * If the question were now new, and the business of the country not so deeply involved in transactions of the kind before named, I believe it would be differently ruled." The note discounted in that case had one year to run, and interest at the highest legal rate was taken out in advance, and, yielding to authority, the court held that it was not usury. The proof in the case at bar tends to show that it is customary in the vicinity where this note was executed to pay debts in the fall or winter season, when the proceeds of the cotton crop can be realized; and that notes for the payment of money are made in reference to this, for convenience of trade. And it may be supposed that the business of the country is largely involved by reason of this custom, which, in our judgment, ought not to be ignored in this opinion. In Fleckner v. Bank, 8 Wheat. 339, a note to the bank, dated the 26th of March, 1818, payable the 1st of March, 1820, was discounted for the full term it had to run by taking out or reserving in advance the interest at the highest legal rate allowed by law, and it was held that this was not usury. In discussing the question, Judge Story, who delivered the opinion of the court, said: "If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal." He also said, in substance, that taking interest in advance is not usury in bankers or others. It is so well settled that we deem it unnecessary to cite the numerous cases to show that it is the consensus of judicial opinion that it is not usury for a bank to discount commercial paper in the usual course of business by taking out the interest in advance, at the highest legal rate, even in the absence of a statute allowing it; this being the universal custom, which has grown into law, and in reference to which the provision of our constitution upon the subject of usury is presumed to have been framed and adopted. There are numerous decisions of courts of last resort in other States of the Union which, in effect, hold that there is no distinction to be taken between discounting paper used in commercial transactions, whether it has a long or short time to run. In the early cases in England, discounting paper in advance was held to be usurious, without regard to the time it had to run; and the right to do so grew out of the custom of bank in commercial transactions, for the convenience of trade. The banks confined their discounts in paper having from 30 to 90, and sometimes 120 days to run; but it seems that as the commercial transactions became more extended and numerous, and the necessities and convenience of different localities demanded, the custom widened and expanded to meet the growing and ever-changing conditions of commerce and trade. As is shown by many decided cases in other States, the custom of discounting commercial paper having a year, and even more, to run was clearly recognized, and such transactions were held not to be usurious,

where the highest legal rate of interest was taken in advance, before the adoption of our constitution. As our constitution was adopted before this question had arisen in our State or in this court, it is not a harsh presumption that the provision of the constitution above quoted was framed and adopted in reference to a custom well established in other States, and recognized as not in violation of laws similar to our own upon the subject of usury. It must be understood that the legislature thought so when the act above quoted was passed. It cannot be presumed that the legislature intended to override the constitution. It is easy to perceive the policy that might have controlled the legislature in passing the act quoted. Our people were an agricultural people almost exclusively. They were engaged in the production chiefly of cotton, the great staple of the south, which, as the proof shows, is marketed in the fall and winter seasons; and they were in the habit of making their obligations to fall due at a time of the year when they could realize upon their crops. Their general custom was to make their notes and obligations for the payment of money to become due in the fall and winter, and for the additional reason that it is more convenient and less troublesome to the borrower to borrow money on 12 months' time, and pay the interest in advance, than to borrow on 3 months' time, and renew every 3 months for 12 months, and have the interest taken out at each renewal in advance. It may reasonably be supposed that a consideration of the convenience and the saving of trouble to the borrower by making long-time paper and paying interest in advance, and the fact that this was held in other States not to be usurious, under laws similar to our own upon the subject of usury, influenced the legislature to provide that this might be done in discounting any commercial paper. Commercial paper is defined to be "bills of exchange, promissory notes, bank checks, and other negotiable instruments for the payment of moneys which by their form and on their face purport to be such instruments as are by the law merchant recognized as falling under the designation of commercial paper." Black, Law Dict. 226, "Commercial Paper." The note in this case falls within this definition, and within the above act of the legislature.

In discussing the question whether it is usurious to take in advance the highest legal rate of interest in discounting commercial paper, Judge Brewer said, in Tholen v. Duffy, 7 Kan. 408: "It seems difficult upon principle to sustain such a transaction. But in case where a note or bill, is given it is supported by such an overwhelming current of decision, and is a matter of such universal practice, it may well be considered as ingrafted upon the law as a settled rule." And he added: "It was so settled before the passage of our interest law, and, if the legislature had intended to change this rule of construction, such intention would have been plainly expressed." The same may be said substantially in reference to the custom of discounting negotiable or commercial paper having one year to run by taking out the highest legal rate of interest in advance, as affected by our constitution. The custom was well established before our present constitution was adopted. It will be observed that some of the cases cited in Vahlberg v. Keaton to sustain the position that it is not usury to take out in advance the highest legal rate of interest on discounting three-months paper equally sustain the position that it does not constitute usury to so discount commercial paper having six months or a year to run. The only question decided in Hogan v. Hensley, 22 Ark. 413, was that a bond given to an internal improvement commissioner, contracting to pay interest at the rate of 10 per cent. semi-annually in advance, was not negotiable or commercial paper, and that the agreement was usurious and void. This was the question in that case. The case at bar is entirely different for there can be no dispute that the note in this case is negotiable paper governed by the law merchant. The rule laid down in the American and English cases is that there must be a corrupt agreement by some device or shift to take or reserve a greater rate of interest than is allowed by law, and that payment or receipt of usurious interest is *prima facie* evidence of a corrupt agreement. Insurance Co. v. Ely, 2 Cow. 678. The note in this case was drawn by the appellee, or, at her instance, by her attorney payable 12 months after date, to bear interest at the rate of 10 per cent. per annum, after maturity only, and presented to the bank for discount, and was discounted by the bank, for her convenience, by taking out the highest legal rate of interest in advance. We find that there is no evidence of a corrupt agreement in this case; that the transaction was in accord with a custom well established before our constitution was adopted, and with the act of the legislature. We therefore hold that the taking or reserving of the highest legal rate of interest in advance on negotiable paper having 12 months to run is not usurious. The decree in this case is reversed, and the cause is remanded to the Circuit Court, with directions to enter a decree for the foreclosure of the mortgage.

NOTE.—The custom among banks and merchants of deducting in advance the highest legal rate of interest, upon the discounting of negotiable paper, is uniformly held to be free from usury, even in those States where it has been considered usurious for private persons to stipulate for payment of interest in advance. 27 Amer. & Eng. Encyclopedia of Law, 989; Walker v. Bank of Washington, 3 How. (U. S.) 62; Bank of Utica v. Wager, 2 Cow. (N. Y.) 712; Bank of Utica v. Phillips, 3 Wend. (N. Y.) 408; Manhattan Co. v. Osgood, 15 Johns. (N. Y.) 162; State Bank v. Cowan, 8 Leigh (Va.), 238; State v. Bank of Ayres, 7 N. J. L. 130; Vahlberg v. Keaton, 51 Ark. 534. In referring to the taking in advance, on a discount of the entire amount of interest, Denio, J., says, in Marvine v. Hyniers, 12 N. Y. 223: "It is obvious that in this way the lender, by investing the money thus retained, may realize more than at the

legal rate of seven per centum, and if the case were *res novum* it would be difficult to sustain the practice. But we are not authorized to disregard the uniform course of decisions which for a long series of years have declared it to be legal." Unless otherwise provided by their charters, banks occupy the same position in respect to the usury laws as do private individuals, and must take, whether by discount or otherwise, no more than the legal rate of interest on loans. Chafin v. Lincoln Sav. Bank, 7 Heisk. (Tenn.) 499. As the dissenting judge in the principal case says, the practice of discounting bills or notes by deducting from their face the highest rate of interest allowed by law for the whole time which must expire before they become due, is undoubtedly usurious in the strict sense of the word, for the lender receives interest on the whole amount of the principal for the use of only a part. "But this practice," says Mr. Parsons in his work on Contracts, "began with our banks and it was finally so firmly established that it was sanctioned by the courts almost of necessity." It was allowed and tolerated by the courts for the benefit of trade, and was confined to such paper as will and usually does circulate in the course of trade. In Marsh v. Martindale, 3 Bos. & P. 158, Lord Alvanley expressly admits this to be the established law in relation to the negotiation of bills of exchange made in the usual course of trade. But he holds the transaction in that case to be usurious principally because the bill discounted was a bill at three years. He says: "The jury were impressed with the notion that the bill at three years was such a bill as no reputable man would discount, though it was said that some East India bills at two years had been discounted. Indeed, Lord Chief Justice Eyre seems to have thought that the length of the date of a bill was sufficient to afford a presumption that the discount was intended as a cover for a loan, and that when we consider the effect of discounting bills at very long dates the strength of this presumption will be manifest, for if the practice be carried to a great length the interest will annihilate the principal." In Insurance Co. v. Ely, 2 Cow. 703, Mr. Justice Sutherland, after a short review of the English cases, says: "The principle to be extracted from these cases and from a variety of others which might be cited in confirmation of them I hold to be this: That the taking of interest in advance is allowed for the benefit of trade, although by allowing it more than the legal rate of interest is in fact taken. That being for the benefit of trade the instrument discounted or upon which the interest is taken in advance must be such as will and usually does circulate or pass in the course of trade. It has been held that it is usury for the party making the loan to deduct as discount more than the lawful rate of interest for the time the instrument has to run. Claflin v. Boorman, 122 N. Y. 385. Though it is not usury to include in the computation the three days of grace allowed by the law merchant. Bank of U. S. v. Crabbe, 2 Cranch (C. C.), 299, nor to include both the first and last day of a note at thirty or sixty days. Crump v. Nicholas, 5 Leigh (Va.), 251; State Bank v. Cowan, 8 Leigh (Va.), 238. It is obvious, that the right to take interest in advance can be exercised to such an extent that any amount of excessive interest may be collected, and our usury laws will cease to be a protection to the necessitous borrower. Thus, if A discounts the note of B for $2,500, payable at 10 years, by taking 10 per cent. per annum interest inadvance for the whole time the note has to run, he would take the whole of the $2,500, and B would not receive a dollar and A would have his note. There must be some limit to the right, as the dissenting judges in the principal case who hold the transaction to be usurious case contend. Where shall it be? they ask. They answer that it should be "confined within the limits existing when first sanctioned by the courts; that is to say, to such short-time paper as will, and usually does, circulate or pass in the course of trade, according to the long established custom of banks. It should not be extended further than it did when the courts, constrained by the necessities of trade, first sanctioned it. In speaking of it, Mr. Parsons says: 'There seems · · · to be a strong disposition to limit this practice to short paper, or at least not to apply it to long loans or discounts.' 3 Pars. Cont. *131. There is no valid reason for extending it further. Newell v. Bank, 12 Bush, 56. We should keep within the limits of the rule established by Vahlberg v. Keaton, 51 Ark. 541. See Smith v. Parsons, 57 N. W. Rep. 311."

BOOK REVIEWS.

GENERAL DIGEST, ANNUAL, VOL. 9.

We have had upon our desk for some time this, the latest, annual digest, issued by the Lawyers' Co-operative Publishing Co., have made good use of its contents, and thereby have been able to determine its value and availability by practical tests. We do not hesitate to say that our experience has clearly demonstrated its accuracy and comprehensiveness. We have repeatedly made favorable comment upon the manner in which the Co-operative Publishing Co. executes its work. In point of care, attention to details and exhaustiveness, its series of reporters and digests are unexcelled, and it is plain to be seen that its editors are alive to the importance of the task assigned them. This volume is very large and is a complete compendium of the work of courts for the year 1894, with reference not only to its own series of well annotated reports, but also in most instances to the official State report. Published by The Lawyers' Co-operative Publishing Co. Rochester, N. Y.

COGLEY'S DIGEST OF THE LAWS OF THE DISTRICT OF COLUMBIA.

The value of this work in its local domain will be readily recognized. That it is also useful in other jurisdictions, an examination of its contents will suffice to demonstrate. The British statutes which are in force by statutory enactment in many of the States, the United States Criminal Statutes generally, and the United States Statutes relative to the taking of evidence, etc., in any Federal Court will be found herein, thus obviating the handling of the unwieldy United States Revised Statutes. For this reason, if no other, this compilation of statutes will be of value to practitioners in Federal Courts. Published by T. S. Cogley. Washington, D. C.

BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. 41. San Francisco: Bancroft-Whitney Company, Law Publishers and Booksellers. 1895.

Students' Review of Law and Equity, embracing questions and answers on Contracts, Torts, Criminal Law, Negotiable Instruments, Evidence, Domestic Relations, Common Law Pleading, Equity Pleading and Practice, Equity, and Real Property. By Lawrence O. Murray, LL.M. of the New York Bar, and Charles E. Riordan, LL.M., of the Bar of the District of Columbia, Washington, D. C.: W. H. Lowdermilk & Co. 1895.

The Statute Railroad Laws of New York, containing the General Railroad Law, the General Corporation Law, the Stock Corporation Law, the Statutory Construction Law, the Rapid Transit Act, the Condemnation Law, and the General Laws relating to Elevated Railroads, Street Surface Railroads, Municipal Aid Bonds, Bonds and Contracts, the Construction, Operation and Management of Railroads, Railway Appliances, Tickets, Baggage and Mechanics' Liens, with numerous citations. Also the general laws regarding Taxation and Receivers, the Code of Civil Procedure, Penal Code and Code of Criminal Procedure, Provisions applicable to Corporations, fully Annotated, and the Interstate Commerce Act, together with the notes of Judicial Decisions applicable to Railroad, Corporations and Rapid Transit Railroads, supported by copious citations from American and English Authorities, and Tables showing what Laws the Consolidated and Corporation Acts are based upon, and what laws were repealed by these acts to and including the year 1894. By George A. Benham, of the Troy Bar. Albany, N. Y: W. C. Little & Co., Law Book Publishers and Booksellers, 1894.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION ON THE CASE—Consequential Damages.—When defendant, having the right to enter the premises occupied by plaintiff for the purpose of repairing a furnace, wrongfully removed and destroyed the furnace, the injury being consequential in its nature, case is the proper form of action. — VOGEL v. MCAULIFFE, R. I., 31 Atl. Rep. 1.

2. APPEAL—Negligence of Counsel.— Negligence of counsel is no excuse for failure of appellant to print the record.—DUNN v. UNDERWOOD, N. Car., 20 S. E. Rep. 965.

3. APPEAL—Parties.—One of several defendants having separate and distinct defenses may prosecute an appeal from the county court to the district court without joining his codefendants.—POLK v. COVELL, Neb., 62 N. W. Rep. 240.

4. APPEAL BOND—Justification by Sureties.—Where notice is given to the defendant that sureties on the plaintiff's appeal bond will justify before a justice at a specified time, defendant, by not then appearing, waives the right to assert that there is no justification, though one of the sureties previously withdrew from the undertaking.— BANK OF ESCONDIDO v. SUPERIOR COURT OF SAN DIEGO, Cal., 39 Pac. Rep. 211.

5. ATTACHMENT—Conversion.—Under How. Ann. St. § 7998, providing that the property attached shall remain in the hands of the officer unless a bond for release thereof be given, an officer who, without an order and before judgment, sells part of the property, and permits the balance to be taken beyond the jurisdiction of the court, is a trespasser *ab initio*, and liable for conversion.—TERRY v. METEVIER, Mich., 62 N. W. Rep 164.

6. ATTACHMENT—Dissolution.—On a motion to dissolve an attachment, the levy upon property as that of a defendant forbids plaintiff's denial that such defendant has an ownership interest therein.—STANDARD STAMPING CO. v. HETZEL, Neb., 62 N. W. Rep. 247.

7. ATTACHMENT—Dissolution.—Where a sheriff seizes goods under an attachment valid on its face and regularly issued, and it is adjudged that no cause for attachment existed, no liability rests on the sheriff if the goods are destroyed while in his possession, but the attaching creditor is in such case liable for the full value, under Rev. St. §§ 2746, 2747, providing that, if the finding is for the defendant, the court shall order the property attached to be delivered to defendant, and allowing defendant damages for any injury thereto.—STANLEY v. CAREY, Wis., 62 N. W. Rep. 188.

8. AWARD—Defenses.—Where the parties to an executory contract agreed that all disputes in relation thereto shall be first submitted to the arbitrament of one or more named persons, one of the parties cannot, in a suit on the award, raise questions which he might have presented to the arbitrators, or reopen questions on which they were authorized to pass, and did in fact determine, making the award.—GOWEN v. PIERSON, Penn., 31 Atl. Rep. 83.

9. AWARD—Validity.—An award not conforming to the agreement of submission is invalid.—SAWTELLS v. HOWARD, Mich., 62 N. W. Rep. 156.

10. BANK—Check.—The crediting by a bank of the amount of a check to the account of a depositor indebted to it does not make the bank a *bona fide* holder for value of the check.—FIRST NAT. BANK OF MONTGOMERY v. NELSON, Ala., 16 South. Rep. 706.

11. BANKS—Interest Allowed National Banks.—Rev. St. U. S. § 5197, authorizes national banks to take interest at the rate allowed in the State where the bank is located, and, when no rate is fixed by the laws of such State, they are authorized to take interest at a rate not exceeding 7 per cent.: Held, that since 1 Hill's Code § 2796, and Sess. Laws 1893, p. 29, allow individuals and State banks to take any rate of interest agreed to in writing by the parties to the contract, national banks have the same privilege.—WOLVERTON v. EXCHANGE NAT. BANK OF SPOKANE, Wash., 39 Pac. Rep. 246.

12. CARRIERS OF PASSENGERS— Ejection.— Where a transfer check given to a passenger on leaving a street car has two punches,— one correctly indicating the

hour when issued, and the other showing it to be two hours old,—and the passenger takes the proper car immediately after receiving the check, the conductor has no right to treat the check as old, and ignore the correct time punched thereon, and the company is liable for the passenger's ejection.—LAIRD v. PITTSBURGH TRACTION CO., Penn., 31 Atl. Rep. 51.

13. CHATTEL MORTGAGE — The right of a mortgagee, who is cashier of a bank, to possession of a stock of goods mortgaged to him to secure the mortgagor's present and future indebtedness to the bank, as against the receiver of the mortgagor, is not affected by the fact that the mortgage does not run to the bank, where the other creditors knew of the purpose of the mortgage, and were not prejudiced by the fact that the mortgage was not to the bank.—CHAFEY v. MATHEWS, Mich., 62 N. W. Rep. 141.

14. CHATTEL MORTGAGE—Lien.—Where a surety on a purchase-money note, which retains title to the chattel for which it is given, pays it without having it assigned to a trustee for his benefit, and the purchaser, after mortgaging it, delivers to him the chattel, the mortgagee has the first lien.—BROWNING v. PORTER, N. Car., 20 S. E. Rep. 961.

15. CONSTITUTIONAL LAW—Monopolies—Police Power. —The legislature cannot under the guise of the police power, enact measures which restrain the citizen in the free pursuit of a lawful occupation; but, in passing on the validity of such a statute, the courts should always assume that the legislature intended by its enactment to protect the public health and serve the public comfort and safety; and, if the act admits of two constructions, that should be given to it which sustains it and makes it applicable in furtherance of the public interests. — PEOPLE v. WARDEN OF CITY PRISON, N. Y., 39 N. E. Rep. 686.

16. CONTRACT—Damages.—Plaintiff was not entitled to recover damages for loss sustained by reason of a breach of the contract set out in the opinion after the suit was instituted, since the time fixed for full performance by the defendant had not then elapsed.—TERRY v. BEATRICE STARCH CO., Neb., 62 N. W. Rep. 255.

17. CONTRACT—Damages.—Where a bond contains a contract for the performance of certain things, and the obligor binds himself in a penalty for the performance of the contract, the penalty is not the limit of recovery on the instrument.—MEINERT v. BOTTCHER 62 Minn., N. W. Rep. 276.

18. CONTRACT—Services. — A person accepting employment as a dyer impliedly stipulates that he is qualified to perform the work, and is liable to his employer for damage arising from his unskillfulness.—WOODROW v. HAWVING, Ala., 16 South. Rep. 720.

19. CONTRACT MADE UNDER DIRECTION OF COURT.—D had an agreement with the executors of her husband's estate as to what should be allowed her from such estate, in settlement of her claim for dower, as against the provisions of her husband's will, to which agreement the executors desired to obtain the assent of the court. They accordingly filed a petition in a State court, and obtained a decree ratifying the settlement, and directing them to execute a contract in pursuance of it. The contract, so made, not having been performed, D brought suit in the United States court against the executors to recover the money agreed to be paid: Held, that such suit was upon the contract, and not upon the decree of the State court, and could be maintained without regard to the question of the right to sue, on a judgment of a State court, in a United States court sitting in the same court.—DAVIS v. DAVIS, Ga., 65 Fed. Rep. 381.

20. CONTRIBUTION—Joint Wrongdoers.—In an action for contribution by one joint wrongdoer against another, the test of recovery is whether the plaintiff, at the time of the commission of the act for which he has been compelled to respond, knew that such act was wrongful.—TORPY v. JOHNSON, Neb., 62 N. W. Rep. 253.

21. CONVERSION.—The transfer by one of the property of another, with which he has been intrusted, without authority from the owner, with or without a wrongful intent, constitutes a conversion thereof.—BOLDEWAHN v. SCHMILT, Wis., 62 N. W. Rep. 177.

22. CORPORATION — Joinder. — The right given by Const. art. 12, § 16, to sue a corporation in the county of its principal place of business, or where the liability arose is waived by the joinder as defendant of a third person, who resides in another county; the latter having, under Code Civ. Proc. § 395, a right to have the action tried in the county of his residence.—BRADY v. TIMES MIRROR CO., 39 Cal., Pac. Rep. 209.

23. COUNTY WARRANTS — Limitation.—Rev. St. Mo. 1889, § 3195, providing that county warrants not presented for payment within five years of their date, or being presented within that time, and protested for want of funds, and not presented again within five years after funds are set apart for payment thereof, shall be barred, prescribes a special limitation for actions on such warrants, within section 6791, providing that the limitation of 10 years prescribed by section 6774 for action on any writing for the payment of money shall not extend to any action which shall otherwise be limited by special statute.—MORTON v. KNOX CO., Mo., 65 Fed. Rep. 369.

24. COVENANTS.—A covenantee is not required to resist an action by the holder of the paramount title until actually dispossessed by legal process, but may recover against his covenantor after voluntarily surrendering to the holder of the better title; he, at most, assuming thereby the burden of establishing the title which he has thus recognized.—CHANEY v. STRAUBE, Neb., 62 N. W. Rep. 234.

25. COVENANT IN LEASE—Quiet Enjoyment.—Where a lessee, evicted by a third person, sues, on the covenant for quiet enjoyment, to recover damages for a breach thereof, or for special damages for costs incurred in defending the suit to evict him, the complaint must allege that such person had lawful title, superior to that of the covenantor, at the time the lease was made, and identify the holders of such title.—CHESTNUT v. TYSON, Ala., 16 South. Rep. 723.

26. CRIMINAL LAW—Assault.—Pointing a gun at another within shooting distance may constitute an assault.—STATE v. LIGHTSEY, S. Car., 20 S. E. Rep. 975.

27. CRIMINAL LAW—Burglary—Breaking into Court. house.—A building occupied as a courthouse, in which valuable records and papers belonging to the county are kept and deposited, may be the subject of the crime of burglary in the second degree, and is included within the term "other building" in paragraph 2195 of the General Statutes of 1889.—STATE v. ROGERS, Kan., 39 Pac. Rep. 221.

28. CRIMINAL LAW—Murder—Degrees.—While the presumption is that one who has pleaded guilty to a charge of murder is guilty of murder in the second degree, and the burden is on the commonwealth to show beyond a reasonable doubt that he is guilty of murder in the first degree, it is sufficient if, from the nature and use of the weapon, and the acts of defendant, his intention to kill can be fully and justly inferred with so much time used and opportunity for deliberation as to convince that his purpose was willful and premeditated. — COMMONWEALTH v. COOK, Penn., 31 Atl. Rep. 56.

29. CRIMINAL LAW—Sentence — Suspension.—A court has no power to suspend execution of a sentence, except as incident to a writ of error or on some other legal ground; and having sentenced defendant to pay a fine, and to stand committed till it was paid, not exceeding six months, the term of imprisonment for failure to pay the fine commenced at once; and where the court without legal cause suspended execution of the sentence till further order, and no further order was made till after expiration of the six months, defendant could not thereafter be committed, though

the fine was not paid.—IN RE WEBB, Wis., 62 N. W. Rep. 178.

30. CRIMINAL LAW — Use of Mails to Defraud—Sufficiency of Indictment.—Indictments charging, in substance, either (1) that the defendant willfully devised a fraudulent scheme to obtain money from divers persons, and to cheat and defraud them thereof, by representing that the P. Co. (of which he was president) would, on the receipt of $10, and a further sum of $5 monthly for a time specified, from such persons, issue to each of them a bond in the terms set forth; that it was not intended to pay said persons the money mentioned in said bonds, but that the defendant intended fraudulently to apply the money so received to his own use; that it was intended to employ the United States mails to carry out the scheme by opening correspondence with such persons; and that the mails were so used; or (2), that the defendant devised a fraudulent scheme to obtain money by false pretenses, by representing to divers persons, and particularly to one B, that the P. Co. would pay large sums of money on the receipt of smaller ones, to-wit: $100 on receipt of $60, etc.; that it was not intended to make such payments, but that the defendant fraudulently designed to convert the money to be received from such persons to his own use; that the defendant intended to use, and did use, the United States mails to carry said scheme into effect by opening correspondence, etc., —sufficiently charge offenses under the statutes of the United States in respect to use of the mails to defraud. —UNITED STATES v. DURLAND, U. S. D. C. (Penn.), 65 Fed. Rep. 407.

31. CRIMINAL LIBEL—Indictment.—A libel on two or more persons (although not associated together in business), contained in a single writing, and published by a single act, constitutes but one offense.—STATE v. HOSKINS, Minn., 62 N. W. Rep. 271.

32. CRIMINAL PRACTICE — Removal of Mortgaged Property.—In an information under section 10, ch. 12, Comp. St., for fraudulently removing mortgaged property out of the county, it is unnecessary to aver that the mortgage was in writing. The allegation that the defendant "duly mortgaged and thereby conveyed" meets the requirements of saide section.—WILSON v. STATE, Neb., 62 N. W. Rep. 209.

33. CRIMINAL PRACTICE—Indictment—Several Counts. —An indictment for having counterfeit money in possession may charge the offense in several separate counts, each alleging the possession of a different denomination of coin.—UNITED STATES v. HOWELL, U. S. D. C. (Cal.), 65 Fed. Rep. 402.

34. DECEIT—Reliance on Representations.—In an action in the nature of an action of deceit, it is necessary not only to show the making of false representations justifiably relied upon, but in addition it must be made directly, and not by conjecture, to appear that, from such false representations and reliance in them, there resulted a direct and actual loss to plaintiff.—LORENZEN v. KANSAS CITY INV. CO., Neb., 62 N. W. Rep. 231.

35. DECEIT—Sale of Mining Stock.—The measure of damages on a sale of mining stock, voidable on account of fraudulent representations, is the difference between the real value of the stock at the time of sale and what the value would have been had the representations been true.—WARNER v. BENJAMIN, Wis., 62 N. W. Rep. 179.

36. DEED—Condition Subsequent.—A deed to a railroad company of a right of way, "to have and to hold subject to the following condition, which is made a part of the consideration of the foregoing transfer," the condition being that the railway company would maintain an irrigation ditch, creates a condition subsequent, and does not give the grantor a right to sue for damages for failure to maintain the ditch.—MILLS v. SEATTLE & M. RY. CO., Wash., 39 Pac. Rep. 246.

37. DEED—Delivery.—The presumption that a deed was delivered at or about the day of its date and acknowledgment is rebutted by the execution and delivery of a similar deed several years later.—FLYNN v. FLYNN, N. J., 31 Atl. Rep. 30.

38. DEED—Grantor's Insanity.—Where a grantor in a deed is shown to have been afflicted with general and confirmed insanity before its execution, the grantee must prove the existence of a lucid interval at the time of such execution; and evidence that the grantor was sane, or had intermissions of the derangement, at times prior to the execution of the deed, and subsequent to the existence of the general derangement, is not sufficient to uphold the deed.—PIKE v. PIKE, Ala., 16 South. Rep. 689.

39. DEED OF TRUST.—The court of chancery will not decree that a deed which is in terms one of trust conveys a fee simple, unless the case is so clear that a purchaser of the land by contract would be decreed to accept title on a bill for specific performance.—MARTLING v. MARTLING, N. J., 31 Atl. Rep. 27.

40. DESCENT AND DISTRIBUTION — Administrator's Priority. — An administrator has a right to subject lands of his intestate to the payment of a debt due by the heir to the estate, in preference to the claims of a purchaser from the heir, and also to the lien of a judgment against the heir, attaching to the land on the death of the ancestor.—STREETY v. MCCURDY, Ala., 16 South. Rep. 686.

41. EJECTMENT — Description. — In ejectment, where the general description in the complaint is different from that by courses and distances, the latter controls.—HAGGIN v. LORENZ, Mont., 39 Pac. Rep. 285.

42. EQUITY — Fraud — Estoppel. — It is the duty of a party discovering a fraud to take immediate steps for a rescission of his contract. By his ratification of the acts of which he complains, and to which he was a willing party, he is forever estopped from setting up such defense. — SAUNDERS v. RICHARD, Fla., 16 South. Rep. 679.

43. EVIDENCE.—Where the handwriting in which was affixed the signature to a letter was identified as that of one of the parties to the action on trial, such letter, if otherwise competent and relevant, is admissible in evidence, even though the signature thereto is denied by the testimony of the party charged with writing it. —BURGESS v. BURGESS, Neb., 62 N. W. Rep. 242.

44. EVIDENCE — Privileged Communications—Physician and Patient.—Under Code Civil Proc. § 1881, subsec. 4, limiting the privilege of a physician to civil cases, a physician may testify as to communications by a patient in criminal cases.—PEOPLE v. WEST, Cal., 39 Pac. Rep. 207.

45. EXECUTION — Supplementary Proceedings.—Under How. St. § 8107, providing that on return of an execution unsatisfied the judgment creditor "may obtain an order" requiring the judgment debtor to appear and make discovery as to his property, the affidavit filed for such order need only show that the execution has been returned unsatisfied.—BERLES v. COMSTOCK, Mich., 62 N. W. Rep. 148.

46. FRAUDS, STATUTE OF—Oral Agreement to Convey. —Where a person, old and ignorant, under representations by the grantee, to whom he had implicit confidence, that it was the best course to pursue to avoid liability on a false claim, conveys land, receiving an oral assurance from the grantee that he will reconvey on request, the grantee having, however, no intention to reconvey, the agreement to reconvey is not within the statute of frauds.—ROZELL v. VANSYCKLE, Wash., 39 Pac. Rep. 271.

47. GARNISHMENT — Liability of City.—A city is not liable as garnishee, though its officers and agents appear, without objection, and admit indebtedness.—PORTER & BLAIR HARDWARE CO. v. PERDUE, Ala., 16 South. Rep. 713.

48. GIFT OF LAND — Improvements.—Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable

improvements on the property.—WYLIE v. CHARLTON, Neb., 62 N. W. Rep. 220.

49. HUSBAND AND WIFE—Guaranty of Husband's Duebill.—Defendant, to whom her husband had assigned a duebill, at his request, and without consideration, to enable him to have it discounted, indorsed on the bill a guaranty in blank. The bill was discounted by plaintiff with knowledge that the husband desired to use the proceeds in payment of his own debts: Held, that defendant was not liable on her guaranty on the ground that plaintiff was justified in believing that the husband was acting as defendant's agent in the transaction.—FIRST NAT. BANK OF MARQUETTE v. HANSCOM, Mich., 62 N. W. Rep. 167.

50. INJUNCTION BOND — Restraining Mortgage Foreclosure.—Where a mortgagee obtains an injunction restraining a sale under a prior mortgage, and, pending the injunction, the property is sold to the second mortgagee under his mortgage, the first mortgagee may, on the dissolution of the injunction, sue on the bond for damages resulting from his loss of the property, though he have another remedy.—WHITE v. BROOKE, Wash., 39 Pac. Rep. 237.

51. INSOLVENCY—Evidence.—In an action to set aside the sale of a stock of goods as in fraud of the seller's creditors, evidence that he had a reputation of being slow about paying his debts is competent to show the purchaser's knowledge of the seller's embarrassed condition.—HUDSON v. BAUER GROCERY CO., Ala., 16 South. Rep. 693.

52. INSURANCE—Waiver of Conditions.—The principle laid down in Wilson v. Insurance Co., 30 N. W. Rep. 401, 36 Minn. 112, and other cases, that when an insurance policy contains a condition which renders it void at its inception, and this is known to the insurer when he issues the policy, he thereby waives the condition, applied to a policy of title insurance.—QUIGLEY v. ST. PAUL TITLE, INSURANCE & TRUST CO., Minn., 62 N. W. Rep. 288.

53. INTOXICATING LIQUOR—Illegal Sales—Evidence.—In a prosecution for selling liquor without a license, defendant, on cross examination, cannot be questioned in regard to other sales, either to discredit his testimony or to prove the commission of the offense.—FOSDAHL v. STATE, Wis., 62 N. W. Rep. 185.

54. JUDGMENT — Lien — Tender.—A tender does not extinguish the lien of a judgment, but if a judgment creditor wrongfully refuses a lawful tender of the amount of his judgment, and, while the judgment debtor still holds himself ready, able, and willing to pay the amount, persists in using his judgment for the purpose of redeeming the land of his debtor from a sale on a prior lien, such use of the judgment is wholly in his own wrong; and the court will set aside the attempted redemption, and compel the judgment creditor to accept the tender and satisfy his judgment.—ROTHER v. MONAHAN, Minn., 62 N. W. Rep. 268.

55. LANDLORD AND TENANT — Abandonment. — One leasing a farm agreed to give the landlord as rent a certain portion of the crop. One spring the weather was so wet that he did not put in any crop except some corn, which was "drowned out." He then rented a hotel, and moved his family there, leaving some of his furniture in the farm house, and some of his farm implements and some poultry on the farm. He locked up the farm house, and retained the key. After he moved to the hotel he did some work on the farm in repairing fences and planting corn: Held that he did not abandon the farm.—HOUGH v. BROWN, Mich., 62 N. W. Rep. 143.

56. LANDLORD AND TENANT—Cancellation of Lease.—The partial destruction of leased premises does not, of itself, dissolve the lease. If the demand of the lessee for the cancellation of the lease is resisted, the fact of partial destruction must be necessarily decided by the court, according to the circumstances.—MYER v. HENDERSON, La., 16 South. Rep. 729.

57. LANDLORD AND TENANT—Non-payment of Part of Rent.—Where, under a lease reserving a right of entry for non-payment of rent in advance, the lessor accepts payment in advance of a part of the monthly rent, he waives his right to insist on the forfeiture of the lease during the period covered by such part payment of rent.—BARBER v. STONE, Mich., 62 N. W. Rep. 139.

58. LANDLORD AND TENANT—Recoupment for Fraud.—A lessee who was induced to make a lease by the fraudulent statements of the lessor may, in an action by the lessor for rent due, recoup the amount of any damage he may have suffered by reason of such fraud and misrepresentation, or, if he has fully paid the rent, recover the damages, in an action instituted for such purpose, or on discovering the falsity of the representations made by the lessor, may rescind the contract of lease; that is, he may have his election of remedies, or of courses to pursue.—BARR v. KIMBALL, Neb., 62 N. W. Rep. 196.

59. LIEN—Laborer's Lien.— Under Code 1892, § 2682, providing that every employee, etc., "or other person" who may "aid by his labor" to make, gather, or "prepare" for market any crop, shall have a lien thereon for his wages, share, or interest in such crop, paramount to all incumbrances, except that of the landlord for rent and supplies, a ginner who gins for market has a lien on a part of the "cotton ginned," for his entire labor, as against the mortgagee, to whom the balance of the cotton was turned over.—IRWIN v. MILLER, Miss., 16 South. Rep. 678.

60. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, in causing plaintiff's arrest for selling liquor without a license, a witness for defendant testified that defendant sent him to plaintiff to buy whisky, which he did, and brought it to defendant in a certain bottle. The next day the bottle was found to contain whisky. Plaintiff denied selling the witness whisky, but said he sold him wine under his "beer license:" Held, that whether probable cause was shown was for the jury.—FINE v. NAVARRE, Mich., 62 N. W. Rep. 142.

61. MALICIOUS PROSECUTION — Probable Cause. — Where a person arrested on a warrant is discharged by the justice for want of sufficient proof, the burden of showing probable cause for his arrest is on the person who instituted the prosecution.—SMITH v. EASTERN BLDG. & LOAN ASS'N, N. Car., 20 S. E. Rep. 963.

62. MANDAMUS—Parties.—Stockholders of a corporation, merely as such, are not proper parties respondent in a proceeding to compel the corporation by *mandamus* to perform a corporate act.—STATE v. HOME ST. RY. CO., Neb., 62 N. W. Rep. 225.

63. MASTER AND SERVANT—Fellow-servants.—Injury to a brakeman of a train, while coupling the front car to the engine, by the backing, without warning, of the yard engine against the rear of the train, under the orders of the train master, through the conductor of the train, to the yard master, to take cars out of the train which had got in it by mistake, is an injury occasioned by the negligence of fellow-servants, for which, therefore, the railroad is not liable, as, even if the train master is not a fellow servant, his order is proper, and the negligent execution of it is the cause of the injury.—MARTIN v. CHICAGO & A. RY. CO. U. S. C. C. (Mo.), 65 Fed. Rep. 384.

64. MECHANIC'S LIEN—Improvement on Leased Land.—An agent was authorized by his principal to make leases of his principal's real estate, to collect monthly rents, to care for and look after the property generally, and to look after the interests of his principal in such real property: Held, that notice to such agent that improvements were being made upon a building situate upon his principal's real estate, which were necessary to save and protect the building, and necessary in order to carry on the business for which it was rented, was notice to the principal for the purposes of Laws 1889, ch. 200, § 5.—JEFFERSON v. LEITHAUSER, Minn., 62 N. W. Rep. 277.

65. MORTGAGE—Merger—Purchase of Equity.—Where a mortgagee purchases the mortgagor's equity of re-

demption, and, by consent of the mortgagor, retains the mortgage in order to cut out by foreclosure liens arising after its execution, the mortgage interest is not merged in the title acquired by the purchase.—GIBBS v. JOHNSON, Mich., 62 N. W. Rep. 145.

66. MORTGAGE BY MARRIED WOMAN. — Under the power to contract in relation to her separate property as if unmarried (Gen. St. § 2037), a married woman may mortgage her land.—KUKER v. MCINTYRE, S. Car., 20 S. E. Rep. 976.

67. MORTGAGE SALE—Administrator.—A sale of land under foreclosure is not invalid because the administrator of the mortgagee signed the notice of sale, "C, Assignee of the Mortgagee," and did not state in the notice that he was such assignee by virtue of his office as administrator.—THURBER v. CARPENTER, R. I., 31 Atl. Rep. 5.

68. MUNICIPAL CORPORATION — Change of Street Grade.—The fact that a change of street grade was ordered by a city to enable it to construct a system of sewers calculated to abate a nuisance does not relieve it from the duty imposed by Const. art. 16, § 8, of making compensation to an abutting owner for the depreciation in the market value of his property consequent on the change in grade.—CITY OF PHILADELPHIA v. RUDDEROW, Penn., 31 Atl. Rep. 53.

69. MUNICIPAL CORPORATION—City Warrants.—In declaring on a city warrant which an ordinance requires to be in writing, it need not be alleged that the contract was in writing; a written contract being admissible under a general allegation that the parties contracted.—STEPHENS v. CITY OF SPOKANE, Wash., 39 Pac. Rep. 266.

70. MUNICIPAL CORPORATION—Excavation Near Street —Negligence.—Where a city has exclusive control of its streets, with power to raise money to keep them in repair, it is bound to keep them in a reasonably safe condition for ordinary travel. —SUTTON v. CITY OF SNOHOMISH, Wash., 39 Pac. Rep. 273.

71. MUNICIPAL CORPORATION—Negligence.—Where a city knows that trapdoors which it permits to exist in a sidewalk are dangerous whenever used in the manner in which they were built to be used, and ordinarily are used, and an injury occurs through such dangerous use, it need not be shown that the city knew that the doors were being used at the time of the accident, in order to render it liable for the injuries.—SWEENEY v. CITY OF BUTTE, Mont., 39 Pac. Rep. 286.

72. MUNICIPAL CORPORATIONS—Officers.—The charter of the town of S provided that its officers should consist of a board of five trustees, elected by popular vote, and a treasurer, clerk and others, who should be appointed by the trustees, and should perform various duties appropriate to their offices. The charter was silent as to whether the clerk and other officers should be appointed from the board of trustees or outside that body. A general act, applicable to the town, declared the causes which should create a vacancy in office, not including incompatibility of offices or acceptance of another office: Held, that the appointment to and acceptance of the offices of clerk and treasurer of the town by members of the board of trustees did not vacate their offices as trustees.—SANTA ANA WATER CO. v. TOWN OF SAN BUENAVENTURA, U. S. C. C. (Cal.), 65 Fed. Rep. 324.

73. MUNICIPAL CORPORATION—Open Drawbridge—Liability of City.—Where a city maintains a drawbridge as part of a street, and it fails to make the bridge reasonably safe by providing barriers or lights to prevent accidents when the draw is open, it is liable for injuries to one using the street who, through the want of such light and barriers, walks into the river while the draw is open.—STEPHANI v. CITY OF MANITOWOC, Wis., 62 N. W. Rep. 176.

74. MUTUAL AND BENEFIT SOCIETY—Rights of Beneficiaries.—The refusal of an "administrator," appointed by a member of a benefit association to collect the amount due him therefrom in trust for his wife and children, to perform the trust, will not defeat a recovery of such amount, and an action therefor may be brought by a subsequently appointed administratrix.—NEVILLE v. DETROIT FIREMEN'S FUND ASS'N, Mich., 62 N. W. Rep. 169.

75. NATIONAL BANKS—Insolvency—Set-offs.—Rev. St. U. S. § 5242, which requires a *pro rata* distribution of the assets of an insolvent national bank, and forbids preferences, does not prevent a debtor of the bank from setting off against his indebtedness the amount of a claim he holds against the bank; and it is immaterial whether or not the debt due to the bank had matured at the time of its insolvency.—MERCER v. DYER, Mont., 39 Pac. Rep. 314.

76. NEGOTIABLE INSTRUMENTS — Agreement between Guarantors. — The fact that the application for a loan stated that the note would be guarantied by certain persons is not notice to the lender of an agreement between such persons that all of them should become guarantors before any of them should be bound.—MERRILL v. MUZZY, Wash., 39 Pac. Rep. 277.

77. NEGOTIABLE INSTRUMENTS—Certificate of Deposit. —The plaintiff received from defendants the following certificate: "B has deposited in this bank $8,000 (eight thousand dollars), payable to the order of himself on the return of this certificate properly indorsed. Interest at 6 per cent. if left 12 months for all full months. Interest to cease if not renewed at end of one year from date:" Held, that such a certificate of deposit is a promissory note payable on demand.—BEARDSLEY v. WEBBER, Mich., 62 N. W. Rep. 173.

78. NEGOTIABLE INSTRUMENT—Note—Right to Sue.—A plea, in an action on a note, which alleges that plaintiff is not the owner of the note, but holds it merely for the purpose of collecting it and paying the proceeds to the owner, is demurrable.—MUMFORD v. WEAVER, R. I., 31 Atl. Rep. 1.

79. NEW TRIAL—Death of Judge.—Where appellant's case on appeal and the counter case were duly served, and the judge, who was authorized by written stipulation of counsel to settle the case on appeal, died without doing so, appellant is entitled to a new trial.—PARKER v. COGGINS, N. Car., 20 S. E. Rep. 962.

80. OFFICERS—Illegal Seizure—Liability of Constable. —Where a constable, with a process against the property of one person, seizes, by virtue thereof, the property of another, he is guilty of official misconduct, for which he and his sureties are liable in an action on his official bond.—THOMAS v. MARKMANN, Neb., 62 N. W. Rep. 206.

81. PARENT AND CHILD—Custody of Children.—Where the father is an unfit person to have the custody of his children, they will not be taken from the mother, who is industrious and leading a reputable life, though she is in straitened circumstances, and her mother with whom she lives, is a woman of coarse speech, to give them to the care of their paternal grandfather, who is wealthy.—JOHNSTON v. JOHNSTON, Wis., 62 N. W. Rep. 181.

82. PAROL EVIDENCE.—Upon the faith thereof, goods were furnished to the party in whose favor there was executed by defendant to plaintiffs this written guaranty: "In consideration that S. A. Maxwell & Co. furnish to M. Stoughton merchandise to the amount of $762.32, on credit, I, for value received, hereby guaranty due payment thereof." In a suit to recover the purchase price of such goods, less in amount than above named, evidenced by notes of Stoughton, held that it was not competent to vary the terms of said written guaranty by evidence that the credit contemplated thereby had been in advance, by agreement between plaintiffs and defendant, limited to a certain fixed period of duration.—MAXWELL v. BURR, Neb., 62 N. W. Rep. 236.

83. PARTITION SALE — Inadequacy of Price. — Real estate valued at not less then $8,000 was sold at a partition sale for the sum of $1,500: Held, that the sale was for such a grossly inadequate price as to raise an inference of unfairness, and that the sale should be

set aside.—JOHNSON v. AVERY, Minn., 62 N. W. Rep. 283.

84. PAYMENT.—One of two joint obligees to a contract has a right to receive payment thereon, and such payment discharges the obligation, to the amount paid, whether in whole or in part. — MOORE v. BEVIER, Minn., 62 N. W. Rep. 281.

85. PAYMENT.—Rule applied that giving and accepting of the note of the debtor of an antecedent debt is presumed to be a conditional, and not an absolute, payment of the debt. — WASHINGTON SLATE CO. v. BURDICK, Minn., 62 N. W. Rep. 285.

86. PLEADING — Negative Pregnant. — In replevin a denial in the answer that defendant took "and" carried away the goods described in the complaint is bad as a negative pregnant. — BACH, CORY & CO. v. MONTANA LUMBER & PRODUCE CO., Mont., 39 Pac. Rep. 291.

87. PLEDGE OF COLLATERALS. — Plaintiff assigned a collateral security,—a mortgage and the note secured thereby,—and authorized the assignee, in case of his default, to sell the "mortgage:" Held, that the word "mortgage" must be construed as including the note or debt.—WATSON v. SMITH, Minn., 62 N. W. Rep. 265.

88. PRINCIPAL AND AGENT — Unauthorized Acts. — A real estate agent leased his principal's property for the months of August and September, and collected the rents. He then negotiated a sale of his principal's property, and the deed was made and delivered September 14th. The agent paid the rents in his hands to the purchaser of the propery without his principal's knowledge or consent. The principal accepted the proceeds of the sale, without knowing the disposition the agent had made of the rents: Held, that the agent was liable to the principal therefor.—HOLM v. BENNETT, Neb., 62 N. W. Rep. 194.

89. PRINCIPAL AND SURETY. — A mere oral request by a surety that the creditor sue the principal, and a promise by the creditor to do so, does not alone constitute a waiver of the statutory requirement of a notice in writing.—KITTRIDGE v. STEGMIER, Wash., 39 Pac. Rep. 242.

90. PROCESS—Note—Service Outside of County.—Under How. Ann. St. § 7316, providing that, in an action against joint defendants, process may be served on one or more in a county other than that in which suit is brought, after service has been had on one or more of such defendants in such county, proof of service on those within the county is necessary before service can be had on one in another county.—ALLISON v. WASHTENAW CIRCUIT JUDGE, Mich., 62 N. W. Rep. 152.

91. PROHIBITION—Injunction to Restrain Execution. —Prohibition will not lie, at the instance of an execution creditor, to restrain a trial court from enjoining the execution sale, and from turning the debtor's property over to a receiver appointed by it for the benefit of all creditors.—STATE v. SUPERIOR COURT OF KING COUNTY, Wash., 39 Pac. Rep. 214.

92. PUBLIC LANDS — Town Site Patent.—Offer of public lands for sale at auction is not a condition precedent to their being patented for a town site.—CARTER v. THOMPSON, Mont., 65 Fed. Rep. 329.

93. PUBLIC LANDS — Town Sites — Estoppel.—Where public lands are settled upon for town-site purposes, one who improves a lot, by erecting a building thereon, for purposes of trade, business, or residence, is an occupant, as contemplated by act of congress approved May 14, 1890, relating to town sites in Oklahoma, and is entitled to a conveyance from the town site trustees, although he may have never personally resided upon said lot, or in the town or territory, in the absence of any superior right.—HAGAR v. WIKOFF, Okla., 39 Pac. Rep. 281.

94. RAILROAD COMPANIES — Injury — Contributory Negligence.—Where a brakeman, in violation of his contract and the company's rules, ran in front of an engine tender moving on a track which the brakeman had just passed over, in order to straighten a coupling ink thereon, and in stepping sideways in front of the tender, to keep out of its way, stumbled over a pile of ashes between the rails, which he could have seen had he looked, and was injured, he was guilty of contributory negligence, though it was the custom for brakemen to perform such an act in a similar manner.—LORANGER v. LAKE SHORE & M. S. RY. CO., Mich., 62 N. W. Rep. 137.

95. RAILROAD COMPANY — Killing Stock.—Every railroad corporation in this State is required to fence its tracks, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages.—UNION PAC. R. CO. v. KNOWLTON, Neb., 62 N. W. Rep. 203.

96. RAILROAD COMPANY — Mutual Negligence.—Recovery cannot be had of a railroad for the death of a person killed while walking on its tracks, notwithstanding persons were in the habit of walking there, where the persons in charge of the engine did not discover him in time to prevent the accident, though, by the use of ordinary care, they might have done so, deceased having been in full possession of his faculties, and negligent in not observing the engine.—KIRTLEY v. CHICAGO, M. & ST. P. RY. CO., U. S. C. C. (Mo.), 65 Fed. Rep. 386.

97. REAL ESTATE AGENT—Commissions.—A real estate agent who has acted for both parties to an exchange of property can recover compensation only when his services have been limited to bringing together such parties as, without his interference, have agreed upon an exchange of the property with reference to which such agent procured them to meet, and even this limited right to compensation does not exist as against a party who in advance did not know of and assent to the agent's dual employment.—STRAWBRIDGE v. SWAN, Neb., 62 N. W. Rep. 199.

98. RECEIVERS OF CORPORATION.—Where four shareholders get control of the majority of the stock of the corporation, elect their officers, pocket the dividends, keep false books to deceive the other shareholders, and buy a worthless franchise, for which they mortgage all the corporate property, for the purpose of having the mortgage foreclosed, and the property of the corporation wiped out, a court of equity has power to appoint a receiver for the corporation pending an action by the minority stockholders against the corporation, its managing officers, and the mortgagee to cancel the mortgage and dissolve the corporation.—STATE v. SECOND JUDICIAL DISTRICT COURT OF SILVER BOW COUNTY, Mont., 39 Pac. Rep. 316.

99. RECEIVERS—Powers to Incur Debts.—Where an hotel, conducted by a lessee, is occupied by a large number of permanent guests, who have no other place of residence, a receiver appointed to "run the hotel, and for that purpose to make such purchases as may be necessary," has implied authority to make such necessary purchases on credit, in the absence of any provision for him to raise money in the decree appointing him.—HIGHLAND AVE. & B. R. CO. v. THORNTON, Ala., 16 South. Rep. 700.

100. RES ADJUDICATA—Note—Conclusive Payment.—Where the maker of a note due to an estate resides in a foreign State, a voluntary and collusive payment of the note to an administrator whom such maker procures to be appointed where he resides is not a bar to an action in attachment on the note by the executor in the State in which letters issued. — AMSDEN v. DANIELSON, R. I., 31 Atl. Rep. 4.

101. RES JUDICATA—Decree.—The decree of the orphans' court allowing the account of an administrator on an alleged sale of assets at a certain price is not conclusive as to the value of such assets, where the account was false, no sale having in fact been made.—SCHWEITZER v. BONN, N. J., 31 Atl. Rep. 24.

102. SALE OF GOOD WILL—Injunction.—A covenant, on a sale of a hair goods business, not to engage in "said business of hair dressing, or any of the branches thereof," within certain specified limits, is broken by the vendor's engaging in the business of cutting and dressing the natural hair, though at the time of sale

the dressing of artificial hair was the principal item of the business, and the cutting and dressing of the natural hair merely incidental.—PATTERSON v. GLASSMIRE, Penn., 31 Atl. Rep. 40.

103. SCHOOLS—Election of Teachers—Calling of Roll.—The clause in section 3982, of the Revised Statutes, to-wit. "Upon a motion to employ a teacher, the clerk, of the board shall call, publicly, the roll of all the members composing the board, and enter on the record required to be kept, the names of those voting aye, and the names of those voting no,"—is a mandatory provision, and must be strictly pursued.—BOARD OF EDUCATION OF NEW CONCORD SCHOOL DIST. v. BEST, Ohio, 39 N. E. Rep. 694.

104. SALE TO MARRIED WOMEN — Trover.—A sale of goods to a married woman without the written assent of her husband, as provided in Code, § 2346, and without his consent to her engaging in the business in the course of which they were purchased, as provided in Code, § 2350, is void; and, where no part of the price has been paid, the seller may maintain trover against both husband and wife for their conversion.—STRAUSS v. SCHWAB, Ala., 16 South. Rep. 692.

105. SPECIFIC PERFORMANCE—Misrepresentations of Facts.—A false representation by the civil engineer of plaintiff, a railroad company, to defendant, a quarry company, that, owing to the character of the land, it was impossible for defendant to build a switch to connect with any road but plaintiff's, made to induce defendant to contract with plaintiff to build and convey to plaintiff a switch from the quarry to its road, being a representation as to a fact which the engineer, from his calling, is presumed to know, is a defense to an action to compel defendant to convey the switch after having built it.—LOUISVILLE, N. A. & C. RY. CO. v. RODENSCHATZ-BEDFORD STONE CO., Ind., 39 N. E. Rep. 703.

106. STATUTE—Construction.—In the construction of a statute, the particular inquiry is not what is the abstract force of the words used, or what they may comprehend, but in what sense they were intended to be used as they are found in the act.—LAWRENCE COUNTY v. MEADE COUNTY, S. Dak., 62 N. W. Rep. 131.

107. TAXATION—Bank Stock.—Under Laws 1889, Act 195, § 33, providing that, when a tax is assessed upon shares of capital stock of any bank, the treasurer shall demand payment thereof of the cashier of such bank, and thereupon it shall be the cashier's duty to pay the same, an action to collect a tax assessed against a bank stockholder, upon the cashier's refusal to pay, cannot be brought against the cashier, it being the bank's duty to pay such tax.—CITY OF MUSKEGON v. LANGE, Mich., 62 N. W. Rep. 158.

108. TAXATION—Occupation Taxes.—Code 1880, § 589, relating to occupation taxes, makes void all contracts in relation to the business of one who has not paid his tax: Held, that where one purchased a stock of goods of a delinquent, giving a trust deed of the property to a third person to secure the price, such deed is valid as between the trustee and a creditor of such purchaser.—CRUM v. CARRINGTON SHOE CO., Miss., 10 South. Rep. 674.

109. TRESPASS — Eviction — Damages. — In trespass against a lessor for keeping the lessee out of possession of the land, evidence of the amount paid by the lessor to another tenant to procure a surrender of a lease on other lands is inadmissible on the question of damages.—TAYLOR v. COOPER, Mich., 62 N. W. Rep. 152.

110. TRESPASS—Pleading.—In trespass *quare clausum*, the general denial does not put in issue the title.—OSTROM v. POTTER, Mich., 62 N. W. Rep. 170.

111. TRUST—Delivery.—Where a person conveys real and personal property in trust for his own use during life, and for a religious object after his death, and makes due delivery to the trustees of the personal property and of the deed of the realty, the fact that he retains possession of the land, and afterwards regains possession of the personalty, does not affect the validity of the trust.—WILLIAMS v. EVANS, Ill., 39 N. E. Rep 698.

112. TRUST—Resulting Trust—Purchase by Guardian.—Where a guardian purchases land in his own name with the funds of his ward, a resulting trust is imposed thereon in favor of the ward, with the right, at her election, to call for a conveyance of the land to herself, or to have it subjected to sale for her reimbursement.—THOMPSON v. HARTLINE, Ala., 16 South. Rep. 711.

113. USURY — Evidence. — The rule of evidence in usury cases is the same as in any other civil action. All that is required is a fair preponderance of evidence to establish the fact of usury. There is no device or shift on the part of the lender to evade the statute, under or behind which the law will not look in order to ascertain the real character of the transaction.—PHELPS v. MONTGOMERY, Minn., 62 N. W. Rep. 260.

114. VENDOR AND VENDEE—Defect in Title.—Where one, knowing that he has title to but part of the lot, gives a deed to the whole, and takes a mortgage for the price, and the grantee goes into possession, and makes improvements before learning of the defect in his title, the damage sustained by reason of such defect should be deducted from the amount found due on foreclosure of the mortgage.—ROCKWELL v. WELLS, Mich., 62 N. W. Rep. 166.

115. VENDOR AND VENDEE—Sale of Land—Failure of Title.—The mere failure of title to a portion of the land conveyed is not, in the absence of any concealment by the grantor of defects in his title or fraud, ground for rescinding an executed conveyance of the land by deed with warranty of seisin, though the remainder of the land, in case the grantee is evicted from the portion to which the grantor did not have title, would be useless for the purpose for which the land was purchased.—DECKER v. SCHULZE, Wash., 39 Pac. Rep. 261.

116. VENDOR AND VENDEE—Sale of Land—Death of Vendor.—The title of devisees to land is subject to rights created by contracts of the devisor affecting the title or relating to the land.—HYDE v. HELLER, Wash., 39 Pac. Rep. 248.

117. WATER—Right of Flowage—Prescription.—A person by maintaining for 15 years a dam so as to flow the land of another without complaint from the latter, acquires a prescriptive right of flowage in the land.—WILLAMS v. BARBER, Mich., 62 N. W. Rep. 155.

118. WILLS — Nature of Estate. — Where testator devised to one A. certain land, and by a further clause provided that, in the event of her dying unmarried, or, if married, without offspring, the property should be sold, and the proceeds divided among others, on her surviving the testator she takes an absolute estate.—MITCHELL v. PITTSBURGH, FT. W. & C. RY. CO., Penn., 31 Atl. Rep. 67.

119. WILLS — Perpetuities. — A devise to an executor in trust, which directs that land be sold at a certain time, less then a year after the execution of the will, does not violate the statute against perpetuities, by suspending the power of alienation for a period not measured by lives, as the direction is advisory, and does not limit the power of absolute disposition.—DEEGAN v. WADE, N. Y., 39 N. E. Rep. 692.

120. WITNESS—Transactions with Decedent.—Under How. Ann. St. § 7545, providing that, in proceedings by the heirs or personal representatives of a deceased person, the opposite party cannot testify on his own behalf as to matters within the knowledge of such deceased person, etc., in an action on a note executed by defendant to decedent, his father, and indorsed to plaintiff by defendant's sister, who was also made a defendant, testimony of the sister as to acts and statements of deceased, whereby ownership in the note was transferred to her, is competent, the estate itself not being a party to the action.—LATOURETTE v. MCKEON, Mich., 62 N. W. Rep. 153.